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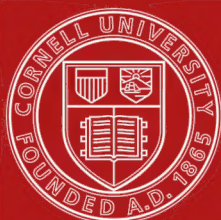
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A T R E A T I S E

ON THE

ACTION OF EJECTMENT

AND

CONCURRENT REMEDIES FOR THE RECOVERY
OF THE POSSESSION OF REAL
PROPERTY.

BY

MARTIN L. NEWELL,

AUTHOR OF "THE LAW OF LIBEL AND SLANDER," "MALICIOUS PROSECUTION,"
AND "SACKETT'S REVISED INSTRUCTIONS TO JURIES."

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PREFACE.

An American author in speaking of the action of ejectment has truly said : "The desire to acquire and to hold property is one of the strongest of the human feelings. It might, perhaps, be better called a passion; so deeply rooted is it, so ardent, and so engrossing. To gratify it, hardships are patiently endured, dangers cheerfully and heroically braved, and even life risked, and sometimes sacrificed. It is founded partly upon the necessity which renders some acquisitions indispensable; partly upon the love of the power and influence which possessions confer; and partly on the avarice which enjoys riches for their own sake. This impulse is toward all material things; in short, toward everything that can become subjects of ownership. But, the more fixed forms of property, as they are the least perishable, minister most permanently to the gratifications and the pride of man, and are susceptible of being transmitted to remote posterity, the most highly esteemed and the most eagerly sought after by him. This, at all events, has always been the case in civilized life. The only exceptions to the rule are to be found among wandering and savage tribes, whose rude tastes and unsettled lives limit them to whatever is present and fleeting. From the earliest ages, therefore, exclusive title in the soil has been among the primary objects of man's ambition. Nations, as well as individuals, have coveted and sought to obtain extensive landed possessions. Nearly all the wars with which the earth has been scourged, though ostensibly owing to other causes, were, in fact, originated by this desire for territorial acquisition. The conquests of Alexander the Great, ending in lamentation that there were no more worlds to conquer, might very well be taken for a splendid allegory, truly illustrating this morbid and insatiable longing of man. The Roman Empire grasped after territory until its very expansion brought weakness and decay. And in more modern times, down to the present day, nations, regardless of the solemn lessons of the past, have continually striven, and are continually striving, to enlarge their area. It is the same with individuals. Despotic rulers, whose will is law, have always held, to their private use, extensive domains; and so also have the kings and nobility of monarchical governments. Indeed, so desirable and so essential to the dignity of their position, has permanent property in land been considered, that stringent laws have been passed, forbidding its alienation. In more favored conditions of society, where most people have a competency, the ambition of men extends in the same direction. It may be well that it is so. Doubtless, the wish to possess a portion of the earth's surface is a more healthful and higher aspiration than the coveting any mere works of art. Certain it is, that those who have most to do with the soil, as independent owners of it, are generally most upright, magnanimous,

generous, enterprising, and brave. Such being the dignity and paramount importance of this species of property, the right to it ought to be definitely fixed and zealously guarded. And so it is. In no branch of the law are the rules more express, clear, and positive. In none are the principles of the common law better settled, the requirements of the statutes more explicit, or the decisions of the courts more uniform or better understood. But, independently of the main subject, there are others incidental and collateral thereto, involving many nice questions, the judicial construction of which has enriched thousands of volumes of reports, and given rise to numerous learned and useful treatises. A good and indefeasible title to real estate is, of course, the foundation of all property in it. As the action of ejectment is an action to test this title, it is necessarily among the most important of our judicial proceedings. Probably, no action comprehends more of the wise regulations of laborious legislatures and of the learning of venerable courts. It is also a very ancient and a very curious remedy. It originally consisted entirely of fictions, and had in it much of the grotesque and even ludicrous. Although it has settled down into a connected, matter of fact, and convenient system, and has consequently lost much of its former character, yet it still retains enough of quaintness, especially in those States which preserve the English practice, to render it highly attractive.”¹

Actions for the recovery of the possession of real property in the United States exist under various names and forms: Ejectment, writs of entry, writs of right, trespass to try title, real actions and statutory remedies for the recovery of real property. The general rules of law governing all these various forms, are substantially uniform and well settled: As to where the action will and where it will not lie and the character of the estates recoverable; the essentials of the plaintiff's case in general as well as legal and equitable titles; the demand for possession, when necessary prior to the commencement of the action; the authority of attorneys to bring the suit; parties, plaintiff and defendant; pleadings; the relation in law existing between vendor and vendee; co-tenants, between themselves and between themselves and third persons; mortgagor and mortgagee; landlord and tenant; the rules of evidence; verdicts, judgments and writs of possession.

These rules constitute, practically, one general system or manner of proceeding for the recovery of the possession of real property, damages for its detention, and the determination of titles in actions at law, disguised as it may be under a variety of names and forms of procedure.

As much of the learning in the older books and even in those more modern, is founded upon common law rules, governing the old action of ejectment, and expressed frequently in language not less modern, a brief history of the old action is given and its fictions illustrated by a declaration taken from Chitty's Pleadings, with its notice to appear, the consent rule, etc.

M. L. NEWELL.

Chicago, 1892.

¹ Thomas N. Waterman, Preface to Adams on Ejectment.

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THE LAW OF EJECTMENT.

CHAPTER I.

A BRIEF HISTORY OF THE ACTION OF EJECTMENT.

- § 1. Preliminary Discourse.
- 2. The Old Action an Illustration of the Fictions of the English Law.
- 3. A Narrative of the Ancient Remedy by Blackstone.
- 4. A Shorter History of the Action by the Author of Walker's American Law.
- 5. Common Law Fictions in Pleadings.
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- 7. The Consent Rule.
- 8. The Consent Rule on Record.
- 9. Nature of the Action in the American States.
- 10. Origin of the Name.
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§ 1. **Preliminary Discourse.**—The old common law action of ejectment, incumbered with its fictitious parties, its leases, entries and ousters, has now become almost entirely obsolete in the United States. The right to recover the possession of real property wrongfully withheld, still remains the same as at common law. The old remedy has been abolished as cumbersome. A new system, adapted more to the ideas of modern times, has grown up. As the ruins of the Roman law may be said to be the foundation of every code in Europe, so it may be said the old system of recovering the possession of real property is the foundation of the new. A brief examination into the history, the origin, progress and nature of the old system will enable us to more thoroughly understand the new.

§ 2. **The Old Action of Ejectment an Illustration of the Fictions of the English Law.**—The history of the English law abounds in illustrations of the national attachment to ancient institutions, and of the reluctance with which, however imperious the necessity, the courts depart from estab-

lished maxims. The progress of society, and the consequent changes in manners and customs, are continually creating new personal rights, and demanding corresponding changes in judicial proceedings; and it is an interesting inquiry to trace out the various contrivances by which the courts have in every period of our history, adapted the principles of the ancient law to the exigencies of the passing time, and ingeniously contrived remedies for wrongs which appear to have been unknown and unthought of when the common law was first introduced. The ordinary mode by which these improvements have been effected, has been by the invention of some legal fiction which leaves the original maxim untouched, but engrafts upon it some deduction by which a remedy or form of proceeding is provided for the particular wrong, and out of which a new maxim or rule springs, for the redress of future wrongs of a similar nature. Indeed, it would seem that these fictions are coeval with the law itself and form part of its simple beauty. "*In fictione legis consistit equitas*," is amongst its favorite maxims, and these fictions blend themselves with all the phases which the law has at different times assumed, and hold a conspicuous part in all judicial determinations. They may be traced in all gradations, from the great constitutional fiction, giving stability to the English throne and security to the subject, which assumes that the king can do no wrong, to the amusing absurdity upon which the old writ of *quo minus* was founded, and which gave to the Court of Exchequer its civil jurisdiction.¹

The old action of ejectment stands prominently forward among these legal fictions. The writ upon which it is founded was not invented until the reign of Edward III, and although in its origin it was a mere action of trespass, enabling a lessee to recover damages when ousted of his possession, it has, by a series of the most ingenious fictions, gradually superseded and ultimately triumphed over the ancient remedies for the recovery of real property, and is now, by the provisions of the act, 3 & 4 Wm., 4 c., 27, § 36, which abolish, with one or two unimportant exceptions, all real actions, become the sole mode of legal proceedings in all cases where the right to real property is in dispute.

¹ Adams on Ejectment, 1.

§ 3. **Narrative of the Ancient Remedy by Blackstone.**¹— Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not, therefore, be improper to delineate with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

We have before seen, that the writ of covenant, for breach of the contract, contained in the lease for years, was anciently the only specific remedy for recovering against the lessor a term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger claiming under a title superior to that of the lessor, or by a grantee of the reversion (who might at any time by a common recovery have destroyed the term), though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed, by a real action, recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione firmæ*, for the trespass committed in ejecting him from his farm. But afterward, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ nor prayed by the declaration (which are calculated for damages merely, and are silent as to any restitution), viz., a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of Edward IV, though it hath been said to have first begun under Henry VII, because it probably was then first applied to its present principal use, that of trying the title to the land.

The better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by ejectment is, in its original, an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order, therefore, to convert it into a method of trying titles to the

¹ 3 Blackstone's Commentaries, 200.

freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offense, called, in our law, *maintenance* to convey a title to another, when the grantor is not in possession of the land; and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance. When, therefore, the person who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in the possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee, and having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land till the prior tenant, or he who had the previous possession, enters thereon afresh, and ousts him; or till some other person (either by accident or by agreement before-hand) comes upon the land, and thus turns him out or ejects him. For this injury, the lessee is entitled to his action of ejectment against the tenant, or this casual ejector, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore, it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any there be), and making him a defendant if he pleases. And, in order to maintain the action, the plaintiff must, in case of any defense, make out four points before the court, viz., *title, lease, entry* and *ouster*. First, he must show a good title in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seized or possessed by virtue of such title, did make him the lease for the present term; thirdly, that he, the lessee or plaintiff, did enter or take possession, in consequence of such lease; and then, lastly, that the defendant ousted or ejected him. Whereupon, he shall have judgment to recover his term and damages; and shall, in consequence, have a writ of possession, which the sheriff is to exe-

cute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the lease, entry and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago by the Lord Chief Justice Rolle, who then sat in the Court of Upper Bench; so called during the exile of King Charles the Second. This new method entirely depends upon a string of legal fictions; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings, a lease for a term of years is stated to have been made by him who claims title, to the plaintiff who brings the action; as, by John Rogers to Richard Smith, which plaintiff ought to be some real person, and not merely an ideal fictitious one, who hath no existence, as is frequently though unwarrantably practiced. It is also stated that Smith, the lessee, entered; and that the defendant, William Stiles, who is called the casual ejector, ousted him, for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration; withal assuring him that he, Stiles, the defendant, has no title at all to the premises, and shall make no defense; and, therefore, advising the tenant to appear in court and defend his own title; otherwise he, the casual ejector, will suffer judgment to be had against him; and thereby the actual tenant, Saunders, will inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession does not, within a limited time, apply to the court to be admitted a defendant in

the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles, the casual ejector Saunders, the real tenant, will be turned out of possession by the sheriff.

But, if the tenant in possession applies to be made a defendant, it is allowed him upon this condition, that he enter into a rule of court to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action, viz.: the lease of Rogers, the lessor, the entry of Smith, the plaintiff, and his ouster by Saunders himself, now made the defendant instead of Stiles; which requisites, being wholly fictitious, should the defendant put the plaintiff to prove them, he must, of course, be non-suited for want of evidence; but, by such stipulated confession of lease, entry and ouster, the trial will now stand upon the merits of the title only. This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith (the plaintiff), on the demise of Rogers (the lessor), against Saunders, the new defendant. And therein, the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee can not obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith, the nominal plaintiff, who, by this trial, has proved the right of John Rogers, his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute (11 Geo. II, ch. 19), on pain of forfeiting three years' rent, to give notice to their landlords, when served with any declaration in ejectment; and any landlord may, by leave of the court, be made a co-defendant to the action, in case the tenant himself appears to it; or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed, in case the landlord applies to be made a defendant, and enters into the common rule—a right which, indeed, the landlord had long before the provision of this statute; in like manner as (previous to the statute of Westm. 2, ch. 3) if, in a real action, the tenant of the freehold made default, the remainderman or reversioner had a right to come in and defend the possession; least, if judgments were had against the tenant, the estate of

those behind should be turned to a naked right. But, if the new defendants, whether landlord or tenant, or both, after entering into the common rule, fail to appear at the trial, and to confess lease, entry and ouster, the plaintiff, Smith, must indeed, be there non-suited, for want of proving those requisites; but judgment will, in the end, be entered against the casual ejector, Stiles; for, the condition on which Saunders, or his landlord, was admitted a defendant is broken, and, therefore, the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process, therefore, as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken.¹

§ 4. **A Shorter History of the Action by the Author of Walker's American Law.**—Ejectment was not originally designed for *trying the title* to land; but has been adopted to this object by means of a series of fictions. In arriving at its present state it has passed through three distinct stages. At first it was only used by the lessee of land, who had been ejected or ousted therefrom *by a stranger*, to recover damages for the ouster. We have seen that in early times a lessee for years had no security for the permanence of his title. As against the lessor, if there was no covenant for quiet enjoyment, the lessee was without remedy; for the lessor could not be treated as a trespasser. But if the ejector was a stranger the lessee might sue him for the ejectment in an action for trespass, and recover damages, but not possession of the land. In process of time, however, the courts of chancery undertook to compel the ejector, unless he could justify the ejectment under a superior title to make restitution of the land to the lessee. In this the courts of law soon followed them, though without altering the form of action. The next stage, therefore, was to enlarge its scope, so as to enable the lessee to recover possession of the land for the unexpired term as well as damages for the ouster. But for this purpose it was necessary to show a better title than the *ejector*, which incidentally brought up for examination the *title of the lessor*, since the lessee could have no other title than

¹ 3 Blackstone's Commentaries, 200.

that derived from him. In this state of things it was perceived by the lawyers that, by recourse to several fictions, the trial of the lessor's title might be made the direct and main object of the action, instead of being an incidental circumstance. For this purpose there was only wanting a fictitious lessee, a fictitious ejector, and a fictitious ouster; and for the sake of getting rid of the almost endless technicalities and subtleties of real actions, the courts readily sanctioned the introduction of these fictions, which have now been acquiesced in for more than three centuries, and the result is, that if I claim title to piece of land, of which you are in possession, I begin by serving upon you a declaration and notice, which in this action takes the place of a writ. The declaration states that I made a lease or demise to a fictitious person, say John Doe; that he entered into possession; and that another fictitious person, say Richard Roe, forcibly ejected or ousted him from the premises. Thus John Doe becomes the nominal plaintiff and Richard Roe the nominal defendant. But appended to this declaration is a notice purporting to be written by Richard Roe to you, informing you that he has been sued, but that being a *casual ejector* only he shall not defend, and advising you to appear and defend. This the court will permit you to do, by entering into a *consent rule*, by which you confess the fictions of a *lease*, *entry* and *ouster*, as alleged in the declaration and agree to try the question of title only. Such is the circuitous manner in which one of the most important actions is made to effect its purpose. The form still remains that of trespass to recover damages for the ouster; but these damages are now merely nominal. You can not even recover, in this action the intermediate profits of the land, while the defendant has been in the unlawful possession of it; but must bring a separate action of *trespass for mesne profits*. Nor is a final judgment in ejectment conclusive of the controversy, as it is in other cases. Ordinarily a final judgment is conclusive between the same parties, in relation to the same matter. But in ejectment the parties, being fictitious, may be changed at will, and the same matter litigated again, until a court of chancery should interfere by injunction; while, therefore, much has been gained by thus superseding real actions, a still further improvement would be to abolish these fictions and

so shape the action as not only to recover possession, but mesne profits.¹

§ 5. **Common Law Fictions in Pleadings.**—This subject may be well illustrated by an analysis of a declaration in ejectment at common law, and an examination of its form and particular facts, or essential averments. Its essential averments are:

First. The title, the court, and term.

Second. The venue.

Third. Designation of fictitious parties.

Fourth. Description of the premises.

Fifth. The fictitious demise.

Sixth. The count.

Seventh. The entry.

Eighth. The ouster.

Ninth. The ad damnum.

Tenth. The conclusion.

§ 6. **The Subject Illustrated—Declaration in Ejectment—Old English Form.**²

(1) *The title. The court, and term.*³ In the King's Bench, Michaelmas Term, 48 Geo. III.

(2) *The venue:* ———, ⁴(to wit.)

(3) *Designation of fictitious parties:* Richard Roe was attached to answer John Doe of a plea, wherefore he, the said Richard Roe, with force and arms, etc., entered into, etc.⁵

(4) *Description of the premises:* The manor of ———, in the county of ———, with the rights, members, and appurtenances thereunto belonging.

¹ Walker's American Law, 620 (1887).

² Chitty's Pleadings, 877.

³ The essential facts of the declaration relating to the title and venue in ejectment, remain substantially the same as at common law, and are essential to every well drawn complaint.

⁴ The venue was local, and even after verdict, if the venue were laid in a wrong county, it would be doubtful whether the plaintiff could obtain possession. 7 T. R. 588.

⁵ Any names might be adopted for these nominal parties. In the use of these fictitious names the lawyers

sometimes indulged in sarcasm, for we find in Burroughs' time one Fairclaim on the demise of Fowler, plaintiff in an action of ejectment against one Shamtitle; but the common names, John Doe, for the supposed plaintiff, and Richard Roe, for the casual ejector, seem to have been preferable. Though usual, it was not necessary to insert the supposed addition of the defendant. The stat. 1 Hen. V, c. 5, not extending to declarations. 3 Bos. & Pull. 399.

It was most usual to proceed in ejectment in K. B. by declaration on a supposed *original writ*.

(5) *The fictitious demise:* Which *A B*¹ had demised to the said John Doe, for a term which is not yet expired and ejected him from his said farm,² and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against the peace of our lord the now king, etc.

(6) *The count:* And thereupon the said John Doe, by *E F*, his attorney, complains that whereas the said *A B*, on the — day of —, in the reign of our said lord the king at the parish aforesaid, in the county aforesaid, had demised the said tenements with the appurtenances to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the — day of —, in the — year aforesaid, for and during, and unto the full end and term of — years, from thence next ensuing, and fully to be completed and ended.

(7) *The plaintiff's entry:* By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed, for the said term, so to him thereof granted as aforesaid.

(8) *The ouster:* And the said John Doe, being so thereof possessed, the said Richard Roe, afterward, to wit, on the — day of —³, in the — year aforesaid, with force and arms, etc., entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not yet expired, and ejected him, the said John Doe, out of his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lord the king.

(9) *The ad damnum:* Wherefore the said John Doe saith that he is injured, and hath sustained damage to the value of 50*l*.

¹ This was to be the person who was the real plaintiff, and who had the *legal estate and right of possession* at the time of the supposed demise, 7 T. R. 47, and if there was any doubt in whom the legal right of possession was vested, or if parties interested be tenants in common, several counts on the several demises of the different persons were inserted.

the *leasehold estate* in the premises, and does not mean a farm in its common acceptation; it is therefore applicable to houses as well as land. 2 Bl. Com. 318.

³ The ejectment or ouster should be stated to have been after the commencement of the supposed demise, and it is usual, though not necessary, to mention a particular day. Cro.

² The term *farm* here signified Jac. 311.

(10) *The conclusion:* And therefore he brings his suit, etc.

[NOTICE TO APPEAR.]

MR. C. D. [*The tenant in actual possession.*]

I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next — term (or if the premises lie in *London* or *Middlesex*, “*on the first day of next term*”), in his Majesty’s Court of King’s Bench, wheresoever, etc. (or in the Common Pleas, “*in his Majesty’s Court of Common Bench at Westminster*”), by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession.

Dated this — day of —, A. D. —.

Yours etc.,

RICHARD ROE.¹

¹Strictly speaking this was the ment. 2 T. R. 351. Under the name of the casual ejector, but where statute of Illinois, which abolished the notice was signed in the name of the common law fictions, but retained the common law practice and John Doe, the nominal plaintiff, the pleadings, the declaration has taken court refused to set aside the judgment. the following form:

STATE OF ILLINOIS, }
Cook County, } ss.

In the Circuit Court of said county, October Term, A. D. 1889.

John Doe, plaintiff in this suit by George Ross, Attorney, comes and complains of Richard Roe, defendant, who is summoned according to the form of the statute, in such case made and provided, in a plea of ejectment.

For that whereas, the said plaintiff was on the first day of September, in the year of our Lord one thousand eight hundred and eighty-nine, possessed of a certain premises, with the appurtenances, situate in the said county, and known and described as follows, to wit: The South West quarter of section thirty-four, in township thirty-eight north, of range twelve, east of the third principal meridian. Which said premises the said plaintiff, John Doe, claims in fee, and the said plaintiff, John Doe, being so possessed thereof, the said defendant, Richard Roe, afterwards, to wit, on the second day of September, in the year of our Lord one thousand eight hundred and eighty-nine entered into the said premises, and ejected the said plaintiff, John Doe, therefrom, and unlawfully withholds from the said plaintiff, John Doe, the possession thereof, to the damage of said plaintiff of one hundred dollars, and therefore he brings suit, etc.

GEORGE ROSS,
Attorney for Plaintiff.

§ 7. **The Consent Rule.**—In many of our States where the rules of the common law prevail, we find statutory enactments, of which the following is an example :

The consent rule abolished. “The consent rule, heretofore used, is hereby abolished.”¹

These enactments naturally lead us to the inquiry as to what the consent rule is. Under the old English practice, in order to lay the foundation of this action, the party claiming title entered upon the land and then gave a lease of it to a third person, who, being ejected by the other claimant, or some one else for him, brought a suit against the ejector in his own name. To sustain the action, the lessee was required to prove a good title in the lessor, and in this collateral way the title was tried. To obviate the difficulty of proving these forms, the action was made substantially a fictitious process.

The defendant was required to confess that a lease had been made to the plaintiff, that he entered under it, and that he had been ousted by the defendant; or, in other words, to admit or confess the lease, entry and ouster, and that he would rely only upon his title. This was the consent rule. The defendant was required to enter on record that he confessed the lease, entry and ouster of the plaintiff. The rule contained the following particulars: 1st. The person appearing consents to be made defendant instead of the casual ejector. 2nd. To appear at the suit of the plaintiff, and if the proceedings are by bill, to file common bail. 3rd. To receive a declaration in ejectment and to plead not guilty. 4th. At the trial of the case to confess the lease, entry and ouster, and insist upon his title only. 5th. That if, at the trial, the party appearing shall not confess lease, entry and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the cost of the *non pros.*, and suffer judgment to be entered against the casual ejector. 6th. That if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry and ouster, the lessor of the plaintiff shall pay costs to the defendant. 7th. When the landlord appears alone, that the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order.²

¹ R. S. Illinois, 1845, p. 207, § 18.

² 4 Bouvier's Institutes, 59; Adams on Ejectment, 233.

§ 8. **The Consent Rule on Record.**—The following form of the entry upon the records of the Court of Common Pleas more fully illustrates the subject:

———Term in the —— year, &c.

——— the —— day of

——— (to wit) Doe, on the demise of A. B. } It is ordered
against Roe. } by consent of

I. K., attorney for the plaintiff, and L. M., attorney for C. D.,
who claims title to the tenements in

question, which premises he, the said C. D. hereby admits to be or consist of (*here describe the premises for which it is intended to defend*) for which he intends (as *tenant* or *landlord*) to defend this action of trespass and ejectment, that he may be admitted defendant, and that the said defendant shall immediately appear by his attorney, who shall receive a declaration, and plead thereto the general issue, this term; and at the trial thereupon to be had, the said defendant shall appear in his own proper person, or by counsel or attorney, and confess lease, entry, and ouster, and that he was, at the time of the service of the declaration, in possession of the premises hereinbefore mentioned and specified, and insist upon the title only, otherwise let judgment be entered for the plaintiff against the now defendant by default. And by the like consent, it is ordered, that if, upon trial of the said issue the said C. D. shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute this action against the said C. D., then no costs shall be allowed for not further prosecuting the same, but the said C. D. shall pay costs to the plaintiff's lessor in that case, to be taxed by the prothonotary. And it is further ordered by the like consent, that if, upon the trial of the said issue, a verdict be found for the said C. D., or it shall happen that the plaintiff shall not further prosecute his said action for any other cause than for not confessing lease, entry, and ouster, and such possession as aforesaid, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

By the Court.¹

§ 9. **Nature of the Action in the American States.**—In those States in which the code system prevails, it is usually

¹Adams on Ejectment, 472.

provided that all forms of actions existing prior to the adoption of the code be abolished, and that thereafter there be but one form of action called a civil action.¹

In Illinois, where common law actions are preserved, the action of ejectment is said to be under the statute regulating it a real action, and not even technically, an action in tort.² In other States it is held to be a mixed action.

Ejectment in Michigan is a possessory action, and does not necessarily involve the title of the lands in litigation. The party having the right to the present possession is always entitled to recover, and it is quite unnecessary for him to show more,³ unless some question of damages or the value of improvements made by the defendants requires it.⁴ If the plaintiff has been in possession of the land claiming title, he may rest with that showing as a *prima facie* case; and will be entitled to judgment upon it unless the defendant shows either a present right in himself, or an outstanding title in some third party upon which he is at liberty to rely.⁵ But a mere intruder can not be permitted to protect his intrusion under an outstanding title in a stranger; being a mere trespasser, it would be a violation of just principle to permit it.⁶

§ 10. **Origin of the Term.**—The term “ejectment” is derived from the Latin word *ejectio*—“a casting out,” or from the term *ejectione firmæ*—“ejection, ejectment of farm;” or from the term *quare ejecit infra terminum*—“wherefore did he eject within the term?” Ejectment has been defined to be a personal action, founded on a possessory right, by which a lessee for years, when ousted, shall recover his term and damages. “In some States it is a possessory remedy, and can be maintained only when the plaintiff has a present right of possession. Anciently, as we have seen, it was an action brought by a lessee of lands for years, to repair the injury done him by dispossession. But the action has been so moulded to the condition of the times, as to retain but few traces of its original form. Its

¹ 6 Am. & Eng. Ency. 200.

² Puterbaugh's Common Law, 604.

³ Covert v. Morrison, 49 Mich. 133;
13 N. W. Rep. 390 (1882).

⁴ Berham v. Cook, 43 Mich. 573; 6
N. W. Rep. 868; Covert v. Morrison,
49 Mich. 133.

⁵ Warner v. Page, 4 Vt. 291; 24

Am. Dec. 607; Hibbard v. Little, 9

Cush. (Mass.) 475; Van Anken v.

Monroe, 38 Mich. 725; Gamble v.

Horr, 40 Mich. 561; Covert v. Morri-

son, 49 Mich. 133.

⁶ Jackson v. Horder, 4 Johns. (N.
Y.) 202; 14 Am. Dec. 262; Covert v.

Morrison, 49 Mich. 133.

benefits were extended long since, not only to cases for the recovery of land from which a tenant has been unlawfully ejected, but to cases for the trial of possessory titles and the determination of the right to the freehold itself.

§ 11. **Real Actions.**—A real action was the ancient remedy by which the right of property or of possession in freehold estates or hereditaments was determined, and the possession restored. The complainant or party deforced, was called the demandant; the defendant or party in possession, the tenant. The term was used in contradistinction to personal actions. At common law, in a purely real action, the demandant counted for and recovered the seizin of land, or an interest in realty, and rarely proceeded for compensation in damages or for personal property.¹ The action is still retained in Massachusetts and perhaps a few other States.²

¹ Booth on Real Actions, 74; Stearns on Real Actions, 346; Jackson on Real Actions, 99.

² Revised Statutes Mass. (1882) 1018.

CHAPTER II.

WHEN EJECTMENT IS AND WHEN IT IS NOT THE PROPER REMEDY.

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- 54. Water Courses, etc.
- 55. When the Action Will Lie—Statutory Provisions.

§ 1. **Where Ejectment is the Proper Remedy.**—The property which may be recovered by the action of ejectment is now generally regulated by statute. By the common law rule, the action of ejectment will not lie for anything upon which an entry can not be made, or of which the sheriff can not deliver possession. By this rule, ejectment is only maintainable for corporeal hereditaments; any thing attached to the soil of which the sheriff can deliver possession may be recovered in the action. A very good test is, (1) the thing claimed must be a corporeal hereditament, (2) a right of entry must exist at the time of the commencement of the action, and (3) the interests must be visible and tangible; so that the sheriff may deliver the possession to the plaintiff under the writ of possession issuing out of the court.¹

An ejectment would not lie for lands belonging to the Crown of which the Crown is in possession by its officer; the proper remedy is by petition of right. Nor would it lie for a rent, an advowson, a common in gross, or *pur cause de vicinage*, or any other thing which passes only by grant. But Tithes, though an incorporeal inheritance, could be recovered by this action, but the right of maintaining an ejectment for them did not arise from the common law, it was given by the provisions of the statute, 32 Hen. VIII, c. 7. *Doe v. Roe*, 8 M. & W. 579; *Adams on Ejectment*, 20.

¹ *Black v. Hepburne*, 2 Yeates, 331; *Rowan v. Kelsey*, 18 Barb. (N. Y.) Farley v. Craig, 3 Green (N. J.), 192; 484; *Adams on Ejectment*, 20. *White v. White*, 1 Han. (Del.) 202;

Where one is in possession of land claimed by another, the proper form of remedy is ejectment. *Corporation of the Catholic Bishop of Nesqually v. Gibbon* (Wash. T.), 44 Fed. Rep. 321; 21 Pac. Rep. 315 (1891).

The general rule is, that an action of ejectment will lie for anything attached to the soil, of which the sheriff can deliver possession. *Jackson v. May*, 16 Johns. (N. Y.) 184.

Wherever a right of entry exists, and the interest is tangible, so that possession of it can be delivered, an ejectment will lie for it. *Jackson v. Buel*, 9 Johns. (N. Y.) 298.

The action of ejectment has been held to be the proper remedy in the following cases:

Ejectment lies against persons who have entered on land, and claim possession adverse to the true owner, though they are not personally in possession at the commencement of the action. *Bell v. Foxen*, 42 Fed. Rep. 755; 14 Sawy. (U. S.) 499 (1891).

It is an appropriate remedy by a vendor against a vendee or his assignee to enforce payment of the purchase money on an executory agreement for the sale of land, and will lie on the first default of principal or interest. *Brown v. Divitt*, 131 Pa. St. 455; 26 W. N. C. 55; 19 Atl. Rep. 80 (1890).

It is the proper remedy in behalf of the heirs against the administrator to recover possession of a homestead, where the land occupied by intestate as such homestead at the time of his death consisted of 160 acres or less, or where prior to his death he has, when actually occupying more than 160 acres, filed a written declaration of his homestead in the probate office of the county judge, under act Fla. 1869 (McClel. Dig. p. 531, § 11). *Barco v. Fennell*, 24 Fla. 378; 5 So. Rep. 9 (1888).

But where one or more of the heirs of an estate is a minor, and the ancestor dies actually occupying as his homestead a tract of rural land exceeding 160 acres, and not having filed a written designation of a part thereof as his homestead, ejectment will not lie in behalf of such heirs. The proper remedy for setting aside the homestead is a bill in equity. Acts Fla. 1881, c. 3246, § 2; McClel. Dig. p. 166, § 54; *Id.*

Ejectment does not lie in behalf of an heir as against an administrator, to recover possession of land to which the latter is entitled as an asset of the estate. *Id.*

As against a railroad company which entered upon land, and laid its tracks under a deed of purchase purporting to convey the fee, but passing only the curtesy of the husband of the owner, the wife or her heirs are not estopped from bringing ejectment to recover the land after the death of the husband. *Bradley v. Missouri Pac. Ry. Co.*, 91 Mo. 493; 4 S. W. Rep. 427 (1887).

Nor are they estopped from maintaining the action by the fact that the land sued for has been foreclosed under a mortgage given by the original owner, and has passed into the hands of a corporation formed by the consolidation of several companies, and has been mortgaged for large sums of money to its entire value; it appearing that while those proceedings were going on, the plaintiffs in ejectment were living in a distant State, and it not being shown that they encouraged or knew of what was being done. *Id.*

In an action to recover possession of real property, brought by a devisee

thereof, it was admitted that plaintiff's devisor appeared by the record title to have received a deed of the property, and that the record would show title in his grantor at the time of such conveyance, and production of the record was waived by defendant. *Held*, that plaintiff could recover without additional evidence; that actual possession had been taken of the land under the title shown by the record, as such title, appearing to have been derived from the original owner, was accompanied by constructive possession. *Clason v. Baldwin*, 59 Hun, 622; 13 N. Y. Sup. 681 (1891).

Proof by an heir or devisee, suing in ejectment, that his ancestor died in possession of the land under a *bona fide* claim of right thereto, establishes a *prima facie* case in favor of plaintiff, and he is entitled to recover unless defendant shows a better adverse title. *Wolf v. Baxter*, 86 Ga. 705; 13 S. E. Rep. 18 (1891).

Where a widow in possession asserts title in herself as donee of her deceased husband, and denies that he died seized of the premises, the grantee of the heirs at law of the husband may maintain ejectment against her. *Kellogg v. Gilfillan* (Pa.), 10 Atl. Rep. 888 (1887.)

Where, when plaintiff is in possession of land, defendant erects a house on the land, and incloses it all but a few acres, on which plaintiff's house stands, and assumes and exercises control over it, there is a sufficient ouster to enable plaintiff to bring an action of ejectment on the ground of prior possession. *Gruell v. Spooner*, 71 Cal. 493; 12 Pac. Rep. 511 (1887).

Ejectment is the only adequate and proper remedy against one in possession of certain lots as a landing for a swinging bridge, and claiming the permanent right of possession in hostility to the owner's title. *Lawe v. City of Kaukauna*, 70 Wis. 306; 35 N. W. Rep. 561 (1888).

The owner of the fee of land subject to an easement for a public highway may maintain ejectment for it against an intruder. *Following Weyl v. Railroad Co.*, 10 Pac. Rep. 510; *Porter v. Pacific Coast Ry. Co.* (Cal.), 18 Pac. Rep. 428 (1888).

One is liable in ejectment for a projection of his roof over another's land. *Murphy v. Bolger*, 60 Vt. 723; 15 Atl. Rep. 365 (1888).

Where a person in possession of land conveys his interest to another, he becomes tenant to that other so long as he retains possession; and the grantee, as landlord, under the Vermont statute, is liable to ejectment by a third person. *Hodges v. Gates*, 9 Vt. 178; 5 U. S. Dig. 134.

The heirs of a patentee of land may recover in ejectment, against a person who had the use and occupation of the land as his own, in the lifetime of the patentee, and so continued until after his death, and claimed to hold the same by adverse title; the duration of such possession being less than twenty years. *Lee v. Grunlee*, 6 Munf. (Va.) 303; 5 U. S. Dig. 134.

Under Va. code, ch. 135, § 2, it lies against persons who have made entries and surveys to any part of the land in controversy, and are settling up claims to it; though not in occupation of it, at the time suit is brought. *Harvey v. Taylor*, 2 Wall. (U. S.) 328; 5 U. S. Dig. 134.

To authorize an action of ejectment against an individual, he must be in possession, exercising ownership and claiming title, and his possession must be exclusive of the public. *Redfield v. Utica, etc., R. R. Co.*, 25 Barb. (N. Y.) 54; 5 U. S. Dig. 134.

In Pennsylvania, ejectment is an equitable action; and wherever chancery would decree a conveyance or execute a trust, the courts, through a

jury, will direct a recovery in ejectment. In such case the jury merely ascertains the facts, and the court judges whether the plaintiff is entitled to relief, and determines the extent and mode of relief. *Peetles v. Reading*, 8 Serg. & R. (Pa.) 484; 5 U. S. Dig. 134.

The common law remedy by ejectment, as a means of compelling specific performance, is not taken away in Pennsylvania by the grant of equity powers to the Courts of Common Pleas. *Carson v. Mulvany*, 49 Pa. St. 88; 5 U. S. Dig. 134.

It lies to recover the possession of land sold on execution, the defendant being in actual possession thereof. *Doe v. Mitchell*, 6 Ala. 70; 5 U. S. Dig. 134.

Against the grantor with covenants of warranty by the grantee, without any demand of possession or notice to quit. *Dodge v. Walley*, 22 Cal. 224; 5 U. S. Dig. 134.

And where there is an agreement that the mortgagee may dispose of the premises, in case the interest is not paid annually. *Alsop v. Peck*, 2 Root, (Conn.) 224; 5 U. S. Dig. 134.

The action lies by B for lands mortgaged to him by A, who afterwards leased the same lands to C, who entered under A, paying rent. *Bank v. Bates*, 11 Conn. 519; 5 U. S. Dig. 134.

It lies where the property sought to be recovered is tangible, and an entry can be made, and possession can be delivered by the sheriff. *Nichols v. Lewis*, 15 Conn. 137; 5 U. S. Dig. 134.

And also where land is sold under the authority of a Circuit Court, in Kentucky, upon the petition of adult heirs and infants by their guardian *ad litem*; it not appearing that any statutory guardian of any of the infants had petitioned or had sanctioned the petition, and the proceedings were, in other respects, not in conformity to the statute. *Vowles v. Buckman*, 6 Dana (Ky.), 466; 5 U. S. Dig. 134.

It lies after a breach of a condition for payment of rent upon an actual demand of the rent in arrears. *Morse v. Clayton*, 21 Miss. (13 Smed. & M.) 373; 5 U. S. Dig. 134.

And to regain possession where a widow has been evicted of the mansion house of her husband, and the plantation thereto belonging, before an assignment of dower. *Stoakes v. M'Allister*, 2 Mo. 163; 5 U. S. Dig. 134.

It lies to recover possession of a room in the house. *White v. White*, 16 N. J. L. (1 Harr.) 202; 5 U. S. Dig. 134.

Also by the owner of the soil, where a private individual appropriated to his own use a portion of the public highway. *Wright v. Carter*, 3 Dutch. (N. J.) 77; *Brown v. Galley, Hill & D.* (N. Y.) Supp. 808; 5 U. S. Dig. 134.

It lies generally whenever a right of entry exists, and the interest is tangible, so that possession can be delivered; reservation of "the right and privilege of erecting a mill dam at a certain place described, and to occupy and possess the premises without any hindrance or molestation from the grantee, or his heirs," being such an interest. *Jackson v. Buel*, 9 Johns. (N. Y.) 298; 5 U. S. Dig. 134.

When the land has been held adversely for twenty years, and an entry made by a party who has the true title. *Jackson v. Oltz*, 8 Wend. (N. Y.) 440; 5 U. S. Dig. 135.

It lies against one claiming verbally a tract of land, though he does not occupy the same. *Banyer v. Empie*, 5 Hill (N. Y.), 48; 5 U. S. Dig. 135.

By the owner in fee, against a railroad company who, under a license conferred no legal right, entered upon a street and laid their tracks therein, but had not actually begun to use the same. *Carpenter v. Oswego, etc.*, R. R. Co., 24 N. Y. 55; 5 U. S. Dig. 135.

Although the lessor of the plaintiff and the defendant are living on different parts of the tract, and claiming adversely. *Dobbins v. Stephens*, 1 Dev. & B. (N. C.) L. 5; 5 U. S. Dig. 155.

To recover a life interest in land derived from an agreement by the owner of the land, to allow the plaintiff in ejectment to put a saw-mill on the premises, for the purpose of carrying on business of sawing lumber "so long as he (the plaintiff) wished." *Stancel v. Calvert*, 1 Wins. (N. C.) L. No. 1, 104; 5 U. S. Dig. 135.

It lies in Pennsylvania on a mortgage payable by installments, before all the installments became due. *Smith v. Shuler*, 12 Serg. & R. (Pa.) 240; 5 U. S. Dig. 135.

And to enforce the performance of an agreement to convey land, and to settle the account between the parties arising out of the agreement. *Dickey v. McCullough*, 2 Watts & S. (Pa.) 88; 5 U. S. Dig. 135.

On the contract for the sale of a mill, though the contract embraced other matters connected therewith. *Carmalt v. Platt*, 7 Watts (Pa.), 318; *Irvine v. Bull*, 7 Watts (Pa.), 323; 5 U. S. Dig. 135.

To enforce a condition contained in a deed; otherwise of a consideration, though it amount to a covenant. *Cook v. Trimble*, 9 Watts (Pa.), 15; 5 U. S. Dig. 135.

Although an action of ejectment is founded in fictions, yet, for all the purposes of the suit the lease is to be deemed a real possessory title. *Robinson v. Campbell*, 3 Wheat. (U. S.) 212; 5 U. S. Dig. 133.

The possession of the vendee under an executory contract for a sale of land, becomes tortious immediately upon his failure to comply with the stipulations of the contract, and the vendor has thereupon an immediate right of action. *Cregg v. Von Pheel*, 1 Wall. (U. S.) 274; 5 (U. S.) Dig. 133.

A non-compliance by one who has purchased real estate and gone into possession, with a request to pay the purchase money, on the ground that he is not prepared to do so, and a return to the vendor, without promise to pay at a future time, and without further remark of any sort, of a deed offered, is a failure to comply with the terms of purchase. And ejectment lies at once, without demand or notice, even though the vendor may not himself have been perfectly exact in the discharge of parts, merely formal, of his duty, such want of formality on his part having been waived by the vendee, and though the vendee may have made valuable improvements on the land. *Cregg v. Von Pheel*, 1 Wall. (U. S.) 274; 5 U. S. Dig. 133.

By a purchaser at a sheriff's sale to acquire the defendant's possession; this principle, however, does not apply to a sale where the process is void; as when the sheriff undertakes to sell a life estate, which he can not do. *Snively v. Wagner*, 3 Pa. St. 275; 5 U. S. Dig. 135.

In Vermont it lies against the husband where his interest in the freehold estate of his wife, after issue born alive, is levied upon and he remains in

possession of the land after the expiration of six months from the levy. *Mattocks v. Stearns*, 9 Vt. 326; 5 U. S. Dig. 135.

And also against a person who, under a claim of title, commits acts of trespass upon land, the owner considering him a disseizor. *Chilson v. Buttolph*, 12 Vt. 231; 5 U. S. Dig. 135.

It lies by a trustee against his *cestui que trust*. *Beach v. Beach*, 14 Vt. 28; 5 U. S. Dig. 135.

And against a widow holding possession of the land, of which her husband died seized, and having a right of dower, it not appearing that the land in controversy was assigned her as her dower, or was attached to the mansion house of her husband at the time of his death. *Moore v. Gilliam*, 5 Munf. (Va.) 346; *Chapman v. Armistead*, 4 Munf. (Va.) 382; 5 U. S. Dig. 135.

At the common law the grantee of a reversion could not enter or bring ejectment for breach of the covenants of a lease; and the statute of 32 Henry VIII, giving the right to enter and of action to such grantee, is confined to leases under seal. *Sheets v. Seldon's Lessee*, 2 Wall. (U. S.) 177; 5 U. S. Dig. 134.

It is not the purpose of the Legislature to confine the benefits of the statute which authorize the doctrine of ejectment to the purchaser in the first instance, and to the pre-emptor in the second, but equally to extend them to all persons who might lawfully succeed to their rights. *Cloyes v. Beebe*, 14 Ark. 489; 5 U. S. Dig. 134.

A pre-emption right was granted to A by the land register under an act of Congress; after A's death his children and heirs paid the United States for the land, and the customary receiver's receipt was issued; a fractional interest in this land was conveyed to B by deed, and he, with the heirs, brought ejectment to recover a portion of the land included in the receiver's receipt; it was objected that B had no such interest in the land as to entitle him to be a co-plaintiff in such action. It was held that the objection must be disallowed, and that he might maintain an action. *Cloyes v. Beebe*, 14 Ark. 489; 5 U. S. Dig. 134.

The action of ejectment is merely a possessory action and is confined to cases where the claimant has a possessory title; that is to say, a right to enter on the lands. To support four things are necessary, namely, title, lease, entry and ouster. *Payne v. Treadwell*, 5 Cal. 310; 5 U. S. Dig. 134.

An action of ejectment to recover land in the possession of an employe should be brought against the employer. *Hawkins v. Reickert*, 28 Cal. 534; 5 U. S. Dig. 134.

Before a demandant can maintain ejectment against a tenant, he must put an end to the tenancy. *Jackson v. Hughes*, 1 Blackf. (Ind.) 421.

It lies only against a tenant in actual possession. The plaintiff can not, by electing to the disseized, make a party who merely claims the land, without entry upon it, a trespasser or disseizor, so as to maintain an action against him. *M'Dowell v. King*, 5 Dana (Ky.), 67; 5 U. S. Dig. 134.

The action may be sustained in favor of a person who has been in possession of land, claiming the fee, against another who has ejected him therefrom under a void levy of an execution against a former owner. *Wolcott v. Ely*, 2 Allen (Mass.) 338 (1861).

§ 2. **It Lies for Accretions, etc.**—Accretions, or as they are sometimes called alluvion, constitute a part of the realty for which an action of ejectment will lie.¹

§ 3. **Alluvion—The Term Defined by Mr. Justice Swayne.**—In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule, is that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent, an essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural and not a civil one. The maxim, "*Qui sentit onus debet sentire commodum*" lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss he must bear it; if a gradual gain it is his. The principle applies alike to streams that do and those that do not overflow their banks, and where dikes and other defenses are, and where they are not necessary to keep the water within its proper limits.²

§ 4. **By Blackstone.**³—And as to lands gained from the sea either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at

¹ County of St. Clair v. Lovings-
ton, 23 Wall. (U. S.) 46; Lovington
v. County of St. Clair, 64 Ill. 56; 16
Am. Rep. 516; B. & O. R. R. Co. v.
Chase, 43 Md. 23; Garish v. Clough,
48 N. H. 9; Dearfield v. Arms, 17
Pick. (Mass.) 46; Johnston v. Jones,
66 U. S. (1 Black.) 209. (1861.)

² Swayne, J., in St. Clair Co. v. Lov-
ington, 90 U. S. (23 Wall.) 46 (1874).

³ 2 Blackstone's Comm., 262; Wool-
rych on Waters, 34; Shulte's Aquatic
Rights, 116; St. Clair Co. v. Sav-
ington, 90 U. S. (28 Wall.) 46 (1874).

charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion be sudden or considerable, in this case it belongs to the king; for, as the king is lord of the sea and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.

§ 5. **By the Code Napoleon.**¹—"Accumulations and increase of mud formed successively and imperceptibly on the soil bordering on a river or other stream is denominated 'alluvion.' Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream or one admitting floats or not; on the condition, in the first place, of leaving a landing place or towing path conformably to regulations." ²

Whatever addition is made to the shore of rivers or streams by alluvion, from natural causes or from a union of natural and artificial causes, belongs to the riparian owners of the shores. *People v. Central R. R. Co.*, 42 N. Y. 315; *Adams v. Frothingham*, 3 Mass. 352; 3 Am. Dec. 151.

Islands in an unnavigable river, if altogether on one side of the dividing line, belong to him who owns the bank on that side; if formed in the middle of the river so as to divide the channel partly on each side of the thread of the river, they will be divided between the owners of the opposite banks according to the original thread of the river between them. *Deerfield v. Arms*, 17 Pick. (Mass.) 4; *Hopkins Academy v. Dickinson*, 9 Cush. (Mass.) 548; 28 Am. Dec. 276; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 268; 16 Am. Dec. 342. See section 25.

A riparian owner is entitled to all accessions made to his land by the retreating of the river from its former limits, or by slow or secret deposit so as to leave the soil theretofore inundated, uncovered by water. *Cook v. Burlington*, 30 Iowa, 94; 6 Am. Rep. 649; *Niehaus v. Shepherd*, 26 Ohio St. 45; *Barney v. Keokuk*, 94 U. S. 324; *Benson v. Morrow*, 61 Mo. 352; *Lammers v. Nissen*, 4 Neb. 245; *Mento v. Delaney*, 7 Or. 337; *Patterson v. Gelston*, 23 Md. 447; *Girard v. Hill*, 1 Gill & J. (Md.) 247; *Hogan v. Campbell*, 8 Port. 9; 33 Am. Dec. 267.

The accretion must be imperceptible. It will be sufficient if the deposit can not be detected by the eye in any moment of time. *Benson v. Morrow*, 61 Mo. 352; *Kraut v. Crawford*, 18 Iowa, 554.

The general rule of alluvion applies where the formation is due to artificial causes. *Lockwood v. N. Y. & H. R. R. Co.*, 37 Conn. 387; *Halsey v. McCormick*, 18 N. Y. 149; *Godfrey v. City of Alton*, 12 Ill. 37.

The Legislature can not deprive a riparian proprietor to his right to future alluvion that may be deposited upon his river front. *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122; 36 Am. Dec. 624.

Where the boundary line of land bordering on an artificial pond was

¹ Code Napoleon Book II of Property, § 556.

² *St. Clair Co. v. Lovington*, 90 U. S. (23 Wall.) 46 (1874).

expressed to commence at "a stake near the highwater mark of the pond," and to run thence "along the high water mark of said pond to the upper end of said pond," the boundary line is fixed and permanent, and the grantee is not entitled to any accretions or land left dry by the pond receding. *Cook v. McClure*, 58 N. Y. 437; S. C. Am. Rep. 270.

§ 6. Rules to Partition Accretions Between Riparian Owners.—1. Measure the whole extent of the ancient bank or line of a river, and compute how many rods, yards or feet each riparian proprietor owned on the river line. 2. The next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line, as he owned rods of the old. Then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the point thus determined as the point of division on the newly formed shore. The new line thus formed, it is obvious, will be either parallel or divergent, or convergent, according as the new shore line of the river equals, or exceeds or falls short of the old.¹

§ 7. The Rule Discussed by Shaw, C. J.—"This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river by accretion, and the rule is obviously founded in that principle of equity upon which the distribution ought to be made. It may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of rivers, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations, or sharp projections. In such cases, it would be reduced by an equitable and judicious estimate, to the general available line of the land upon the river."²

§ 8. Essentials of the Plaintiff's Case.—Before a party can set up his claim to accretions and the like he must first show that he owns the shore; and if he fail first to establish such

¹ *Deerfield v. Arms*, 17 Pick. (34 Mass.) 41 (1835); *Johnston v. Jones*, 66 U. S. (1 Black), 209 (1861). ² *Shaw, C. J., in Deerfield v. Arms*, 34 Mass. 41 (1835); *Johnston v. Jones*, 66 U. S. (1 Black), 209 (1861).

ownership, judicial inquiry respecting his rights in or under the water adjoining are abstractions and useless.¹

§ 9. **Where the Rules Do Not Apply.**—The rules of law applicable to accretions and relictions have no application to cases where the change of land is rapid or sudden; where a river suddenly abandons its bed, the title to the soil thus left dry will remain unchanged.²

§ 10. **Reliction.**—This term differs from alluvion in this: The term reliction is applied to lands made by the withdrawal of the waters, by which it was covered. The withdrawal must be slow, gradual and imperceptible. The same rules of law apply equally to alluvion and reliction.³

§ 11. **Encroachments—Buildings and Other Structures.**—Owing to imperfect surveys or ignorance of boundary lines, encroachments are fraudulently made upon the lands of others. Under the head of adverse possession as a defense to actions of ejectment, it will be seen that a person in the possession of real property by a mistake of boundaries not claiming as owner, can not be said to be holding adversely because his occupancy as against the real owner is not intentional. But when an owner of land in erecting buildings and other structures upon his land overreaches his boundary and projects his foundations into the soil or upon the owner of the adjoining land, such an encroachment may amount to an actual ouster, for which the action of ejectment will lie.⁴

§ 12. **Churches, Chapels, etc.**—Under the ancient English doctrine it was held that the action of ejectment would not lie for the recovery of a church or a chapel, because they were considered as sacred things, and therefore not admissible in courts of law, but this doctrine has long since ceased to exist, and this kind of property is now subject to the same rules of law as other property.⁵

¹ *Bates v. Ill. Cent. R. R. Co.*, 66 U. S. (1 Black), 204 (1861).

⁴ *McCoust v. Eckstein*, 22 Wis. 153; *Stedman v. Smith*, 8 E. & B. 1; see

² *Woodbury v. Short*, 17 Vt. 387; section 48.

Lynch v. Allen, 4 Dev. & B. 62; 32 Am. Dec. 671.

⁵ *Lucas v. Johnson*, 8 Barb. (N. Y.) 244; *Van Deuzen v. The Presbyterian Cong.*, 3 Keyes (N. Y.), 550; *Thyn v. Thyn*, Style, 101; *Hillingsworth v. Brewster*, 1 Salk. 256.

³ *Boorman v. Sunnuchs*, 42 Wis. 235; *Warren v. Chambers*, 25 Ark. 120; 4 Am. Rep. 23; *Murray v. Sermon*, 1 Hawks (N. C.), 56.

§ 13. **Commons, etc.**—A common appendant or appurtenant may be recovered in an action of ejectment brought for the lands to which it is appendant or appurtenant, but such right of common must be mentioned in the description of the premises, because, he who has possession of the land, has also possession of the common; and the sheriff, by giving possession of the one, executes the writ of possession as to the other. But it is prudent in such a case, to state in the description of the premises that the common so claimed is a common appendant or appurtenant, although it has been held after verdict, that an ejectment for lands and also for “common of pasture,” generally, is sufficient.¹

§ 14. **Ejectment on Limited Devises, etc.—Estates in Perpetuity Void.**—It is a well established principle in law in the decision of questions arising under wills, that the intention of the testator shall be carried out so far as that intention is consistent with the rules of law. It is a principle of law that perpetuities shall not be permitted to exist. Real estate can not be so conveyed or devised as to be inalienable beyond a certain period or person, because such estates tend to the inconvenience and prejudice of commerce and of society. Where an attempt is made in a will or deed therefor, to create an estate in perpetuity, the law limits the estate and fixes some person in the line upon whom the estate vests in fee simple. And when the estate so vests, the next party in the line of descent will take nothing and he can not maintain an action of ejectment for the possession of the premises.²

APPLICATION OF THE RULE.

Estate by devise in tail male: William Nicoll in his will devised lands to his son for life, with remainder to the first son of his son for life, with remainder to the first and every other son and sons of the eldest son of his son successively, to hold the same in tail male. Subsequently to his death his son married and had a son, which son also married and had a son, so that there was a son, grandson and great grandson of the testator. Richard F. Nicoll, the grandson, brought an action of ejectment against three daughters of the testator who were in possession of the premises, for the recovery of the premises, claiming the same in fee under the will. On the trial the jury found a special verdict on the facts as stated, upon which the Supreme Court rendered a judgment for the plaintiff saying: “It was the intention of the testator that the lessor (plaintiff) should take an estate for life

¹ Adams on Ejectment, 19.

102; Steadfast v. Nicoll, 3 Johns. Cas.

² Jackson v. Brown, 13 Wend. (N. Y.) 18; Chapman v. Brown, 3 Y.) 437; see Long v. Blackall, 7 T. R. Burr. 1626.

only; that intention is contrary to the rules of law as tending to a perpetuity; that intention the court can not effectuate. But to execute the general intent as far as possible, the lessor must take an estate of inheritance, a fee simple." *Jackson v. Brown*, 13 Wend. (N. Y.) 437.

§ 15. **Recovery of Dower in Ejectment.**—The jurisdiction of Probate Courts in the matter of dower is purely statutory and in no way essential to the settlement of estates.¹ It is a proceeding where the estate is solvent in which only the widow and heirs are interested.² Proceedings to assign dower may be had at any time before, during or after administration upon the estate is closed. At common law the assignment of dower was enforced by a writ of *unde nihil habet* or by writ of right of dower against the tenant of the freehold, and if judgment was obtained by the widow she could then recover her possession in an action of ejectment.³ The writ is of the same nature and efficacy as the writ of right to recover the fee.⁴ It issued upon filing a *præcipe* wherein the widow stated that she had been married to and declared herself to have been the wife of the person whom she claimed was her late husband; the writ would be abated if this was omitted.⁵ Until dower had been assigned or if judgment had been obtained upon the writ and possession taken by the demandant, the owner of the fee or remainder-man might enter and take possession to protect his title. The writ of dower is now abolished in most of the States, but ejectment may be resorted to to accomplish the same purpose, and in such case the description of the land in the declaration must be so certain that possession may be delivered by the sheriff without any reference to any description outside of the writ. Any defect of this kind in the description can not be cured by reference to any deeds or records.⁶

The right of dower is not an undivided third of the entirety, but of one-third in severalty.⁷ Nor is it one-third in quantity

¹ Smith's Probate Law, 214.

² Campbell App., etc., 2 Doug. (Mich.) 146.

³ Park on Dower, 283; Roper's Baron & Fernme, 429; 2 Scribner on Dower, 83.

⁴ 2 Black. Comm., 182.

⁵ Fulliam v. Harris, Cro. Jac. 217; Roper's Baron & F. 429; William v. Gwyn, 2 Samuel, 43; 3 Chitty's Pleadings, 1311.

⁶ King v. Merritt, 67 Mich. 194; 34 N. W. Rep. 689 (1887); Evans v. Evans, 29 Pa. St. 277.

⁷ May v. Rumney, 1 Mich. 1-9; Rayner v. Lee, 20 Mich. 384; King v. Merritt, 67 Mich. 194; 34 N. W. Rep. 689 (1887); Stewart v. Chadwick, 8 Clocke (Iowa), 463.

of the lands of which the husband died seized, but the widow is entitled to the use of such a part of the lands as will yield one-third of the entire income of the whole.¹ The right until assignment, is inchoate and can not be set up in an action of ejectment against an heir entitled to the fee.² To the extent it exists it is a continuance of the estate of the husband, and is held of him by appointment of law, and under the statute of limitations is liable to be lost or defeated by lapse of time, the same as any other interest in land. Until it is legally assigned or set off, the person entitled to the fee may bring ejectment against one wrongfully in possession and recover.³

§ 16. **Assignee of Widow's Dower Can Not Maintain Ejectment.**—The right of dower, until it is legally assigned, is a right vesting in action only, a mere right of action and nothing more,⁴ and the general rule is that it can not be aliened so as to enable the grantee to bring an action therefor in his own name. A widow may release her dower to the terretenant, so as to bar herself, but she can not invest any other person with a legal title thereto until it has been assigned.⁵ The right of dower attends the estate and it is only severed by assignment. After such severance it becomes subject to sale and transfer the same as any other life estate, but not before. The widow may release it to the owner of the fee so as to unite it with the fee, but she can not alien or transfer it to a stranger to the title. It has been held in some States that if a widow sell her right of dower before assignment, the purchaser may maintain a writ of dower and compel an assignment in a suit in her name, although it is really for his benefit.⁶ And it has also been held that courts of equity will enforce such a conveyance made before assignment in a proceeding by the purchaser against the heirs and the widow, the

¹ Leonard v. Leonard, 4 Mass. 533; ⁴ Galbraith v. Fleming, 60 Mich. Connor v. Shepherd, 15 Mass. 167; 403; 27 N. W. Rep. 583 (1886); Rayner v. Lee, 20 Mich. 384.

² 4 Kent's Comm., 61, 62; Howe v. ⁵ Galbraith v. Fleming, 60 Mich. McGivern, 25 Wis. 525; Johnson v. 403; 27 N. W. Rep. 583 (1886); 2 Wilmarth, 13 Met. (Mass.) 416. Scribner on Dower, 42.

³ King v. Merritt, 67 Mich. 194; 34 ⁶ Robie v. Flanders, 33 N. H. 524; N. W. Rep. 689; Cox v. Jagger, 2 Lamar v. Scott, 4 Rich (N. C.) 516; Cow. (N. Y.) 651; Shields v. Batts, 5 Thomas v. Simpson, 3 Pa. St. 60; J. J. Marsh. (Ky.) 12; McCammon v. Rowe v. Johnson, 19 Me. 146; Galbraith v. Fleming, 60 Mich. 403. Detroit, etc., R. Co., 66 Mich. 442; 33 N. W. Rep. 728 (1887).

assignee or grantee being considered as succeeding to the widow's right in the premises; and the courts have in such cases decreed an admeasurement of the dower as against the heirs and compelled a new conveyance from the widow after such assignment or admeasurement.¹ But we are unable to find any authority authorizing an action of ejectment to be brought by one purchasing the right of dower before its assignment, either in the name of the purchaser or widow.² At common law a widow could not bring ejectment before an assignment of her dower had been made, and under the statutes of the several States authorizing an action of ejectment in such cases, no provision seems to be made for any other person to bring the action in her place or stead.³

§ 17. **Fisheries, etc.**—According to the old English doctrine the action of ejectment would not lie for the recovery of a fishery because it was simply a profit taken and enjoyed by the mere act of the proprietor himself, but this doctrine has been repudiated. "There is no doubt but that a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in ejectment."⁴

§ 18. **Fixtures.**—A fixture is an article which was a chattel, but which by being physically annexed to the realty by some one having an interest in the soil, becomes part and parcel of it.⁵

The law is well settled that an action of ejectment will lie for the recovery of the possession of a fixture, but it is not easy in all cases to determine what are fixtures. For the determination of this question these rules have been adopted: (1) Annexation to the realty; (2) adaptability to the use or purpose to which the realty is appropriated, and (3) the intention of the party making the annexation.⁶

¹ Potter v. Everett, 7 Ired. (N. C.) 38; Capen v. Pickham, 35 Conn. 88; Eq. 152; Wilson v. McLenghan, McM. (S. C.) Eq. 35; Maccubbin v. Cromwell, 2 Har. & G. (Md.) 443; Galbraith v. Fleming, 60 Mich. 403.

² Galbraith v. Fleming, 60 Mich. 403.

³ Yates v. Paddock, 10 Wend. (N. Y.) 529.

⁴ Ashurst, J., in Rex v. Inhabitants, etc., 1 T. R. 355.

⁵ 8 Am. and Eng. Ency. of Law, 41; Teoft v. Hewitt, 1 Ohio St. 511; as tenants in common, and where one

⁶ 8 Am. and Eng. Ency. of Law, 41. In Pennsylvania where a boiler, engine and stack were erected upon the lands of the plaintiff, at the joint expense of himself and the defendant, under an agreement to use the same as a common source of power, without limitation as to time, the interests thereby created in the fixtures were

§ 19. **The Right to Take Herbage, Grass, etc.**—The right to take herbage, grass and aftermath was formerly held to be sufficient to maintain the action of ejectment. This rule of law rests upon the principle that the party who has a grant of the herbage, grass or aftermath has a particular interest in the soil, although by the grant the soil does not pass to him. He is entitled to all the profits of the land, and to the land itself for the same time, and no person can rightfully enter thereon while he is so entitled.¹

§ 20. **Lands Subject to Easement, etc.**—As a general rule, an action of ejectment will lie to recover the possession of land which is subject to an easement.² The owner of an easement can not be the owner of the estate in which it exists. The right to the fee and the right to the easement, in the same estate, are rights independent of each other, though existing in the same estate. Each party may protect himself by appropriate actions, one to maintain his possession of the fee, and the other to protect himself in the enjoyment of his easement.³

§ 21. **The Same Subject—A General Rule.**—It is a well settled rule of law, that the owner of the land subject to an easement, servitude, or public use, may recover the possession of land in an action of ejectment against a person wrongfully appropriating the same to a purpose wholly foreign to the easement, or servitude.⁴ The rule applies to public highways, private roads, alleys, passageways and the like, but in the ac-

of the tenants in common excluded the other from the use and possession; an action of ejectment could be maintained. *Hill v. Hill*, 43 Pa. St. 521.

¹ *Adams on Ejectment*, 22; *Wheeler v. Toulson*, Hard. 330; *Ward v. Pctifer*, Cro. Car. 362.

² *Tillmes v. Marsh*, 67 Pa. St. 507; *Cooper v. Smith*, 9 S. & R. (Penn.) 26; *Goodtitle v. Alker*, 1 Burr. 133.

³ *Morgan v. Moore*, 3 Gray (Mass.) 319.

⁴ *Etz v. Daily*, 20 Barb. (N. Y.) 32; *Lozier v. N. Y. Central R. R. Co.*, 42 Barb. (N. Y.) 465; *Carpenter v. Oswego & S. R. R. Co.*, 24 N. Y. 655;

Cooper v. Smith, 9 S. & R. (Pa.) 26; *Warwick v. Mayo*, 15 Gratt. (Va.) 528; *Bac. Abr. Tit. Highways B.*; *Brown v. Galley*, Lalor's Sup. 308; *Stackpole v. Healy*, 16 Mass. 35; *Hancock v. Wentworth*, 5 Metc. (Mass.) 446; *Morgan v. Moore*, 3 Gray (Mass.), 319; *Bolling v. The Mayor*, etc., 3 Rand. (Va.) 563; *Wright v. Carter*, 3 Dutch. (N. J.) 76; *Pomeroy v. Mills*, 3 Vt. 279; *Blake v. Ham*, 53 Me. 430; *Ayer v. Phillips*, 69 Me. 50; *Reformed Church v. Schoolcraft*, 65 N. Y. 134; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Goodtitle v. Alker*, 1 Burr. 133.

tion, the land is recovered, subject to the easement or servitude.¹

The plaintiff conveyed a farm to defendant, excepting a highway embraced within its boundaries. The defendant dug up this highway and ran a water pipe across it, set out fruit and shade trees, and piled stones, lumber and manure in it, used a portion of it for farming purposes, and claimed, as against the plaintiff, the right to appropriate the highway to the uses described. Under these circumstances the right to maintain ejectment was sustained. *Etz v. Daily*, 20 Barb. (N. Y.) 32.

§ 22. **Highways, Public Roads, Streets, etc.**—The owner of the land can sustain ejectment against a party who has exclusively appropriated a portion of a highway to his own use, or appropriates it to any other use than this servitude.²

And this is the rule even in a case where the owner conveys the land to another, excepting the part included in the highway; the grantor may maintain ejectment against the grantee, for digging up the highway and running a water-pipe across it; setting out fruit and shade trees upon it; piling stone, lime and manure within its boundaries, and using a portion of it for farming purposes, and claiming as against the grantor to be the owner of the land with the right to appropriate it to such uses.³

The rule in Illinois: The public authorities who have the superintendence and control of the public roads may authorize travel on them by the means of a railroad, and where a railroad company has constructed its road upon and along a public road, such use and possession is a matter between the road authorities and the railroad company, and the right can not be questioned in an action of ejectment by the owner of the land over which the public road has been established. *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377 (1879). The ground upon which this decision rests is that the use of a public highway by a railroad company to transport its passengers is not a misappropriation of the use.

§ 23. **The Rule Does Not Apply Where the Public Authorities Obstruct the Highway.**—By the common law the fee in the soil remains in the original owner where a public road is established over it, but the use of the road is in the public.

¹ *Gordon v. Sizer*, 39 Miss. 805; *Morgan v. Moore*, 3 Gray (Mass.) 319; *Cooper v. Smith*, 9 S. & R. (Penn.) 26.

² *Brown v. Galley*, Lator's Supp. (N. Y.) 308; *Goodtitle v. Alker*, 1 Burr. 133; *Stackpole v. Healy*, 16 Mass. 35; *Bolling v. Mayor*, etc., 3 Rand. 563; *Cooper v. Smith*, 9 S. & R. (Penn.) 26; *Wager v. Troy R. R. Co.*, 25 N. Y. 526; *Wright v. Carter*, 3 Dutch. (N. J.) 76; *Carpenter v. Oswego*, etc., R. R. Co., 24 N. Y. 655; *Lozier v. N. Y. Cen. R. R. Co.*, 42 Barb. (N. Y.) 465; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447.

³ *Etz v. Daily*, 20 Barb. (N. Y.) 32; but see *Redfield v. Utica*, etc., R. R. Co., 25 Barb. (N. Y.) 54.

The owner parts with this use only, for if the road be vacated by the public he resumes the original possession of the ground, and while it is used as a highway he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road. But it seems he can not bring ejectment for the land in cases where it is used by the authorities for purposes other than as a highway.¹

§ 24. Ejectment Lies in Favor of an Infant for the Recovery of Lands Conveyed During Minority.—An infant upon his arriving at full age may repudiate any conveyance of his lands made by him during his minority, and regain his possession in ejectment. In repudiating such a conveyance, it is immaterial whether the minor returns the purchase price of the lands, unless the same or some part thereof remains in his hands after his maturity, in which case it seems it or that part of it remaining must be returned.²

Where a man and his wife, who was a minor, joined in a warranty deed of lands belonging to them in equal shares as tenants in common, the wife may maintain a writ of entry to recover an undivided moiety of the land, although she received part of the price, if it did not appear that she retained such part till she came of age. *Walsh v. Young*, 110 Mass. 396.

It seems that all persons under disabilities, including infants, may by their guardians or conservators repudiate their conveyances and recover possession of lands in ejectment. *Chandler v. Simmons*, 97 Mass. 508 (1867), and cases cited.

§ 25. For an Island in a River.—Where land is formed by alluvion in a river not navigable, by slow and imperceptible accretion, it is the property of the owner of the adjoining land, who, for convenience, may be called the riparian proprietor. In applying this principle, it is quite immaterial whether this alluvion forms at or against the shore, so as to cause an extension of the shore or bank of the river, or whether it forms in the bed of the river and becomes an island, and where an island is so formed in the bed of the river, as to divide the channel and form partly on each side of the thread of the river, if the land on the opposite sides of the river belongs to different

¹ *Barclay v. Howell's Lessee*, 6 Pet. (1872); *Chandler v. Simmons*, 97 (U. S.) 499 (1832). Mass. 508.

² *Walsh v. Young*, 110 Mass. 396

proprietors, the island will be divided according to the original thread of the river, between the rival proprietors.¹

The plaintiff's ancestor sunk a scow filled with stones in a navigable river, on a flat between two channels, and used it for the purpose of fishing when it was bare at low water. The scow was overflowed and submerged at high water. By gradual accretion of sand an island formed over the scow, and emerged from the water. Plaintiff and his ancestor continued to use the island for fishing purposes, and each year mowed the grass growing upon it, but it appeared that a large number of people had used the island for fishing, without license from any one, and without paying for its occupation, and that the plaintiff's claim was not generally known or recognized. It was held that the title to the island, forming as it did, in navigable waters, vested in the State. *Tracy v. Norwich & W. R. R. Co.*, 39 Conn. 382.

A portion of the surface of an island in the Delaware river was washed away by the force of the winds and waves and was overflowed by water. Subsequently a bar began to form by the deposit of alluvion and appeared above the water in the same place which had formerly been occupied by the part of the island swallowed up by the river. The bar began forming below the island, and was for a long time distinct from it, but at length became united with the old island by its own extension through gradual accretions. A person procured a grant of the bar or new island from the State, but the former proprietor claimed, and the court decided, that he did not lose his property in the soil covered by water if it was regained either by natural or artificial means, but that it continued to belong to him, and was not the subject of a new grant from the State. *Norris v. Brooke*, 25 Alb. L. J. 90 (1815).

§ 26. Lands Forfeited by Reason of the Violation of Conditions Contained in the Grant.—It is a well established rule of law that the grantor may maintain an action of ejectment for the recovery of lands conveyed by him, where they have become forfeited by reason of the violation of conditions contained in the grant. The doctrine rests upon the principle that the peculiar covenants of the grant make the premises conveyed an estate upon condition,² and the person for whose benefit the condition was made may have his action for the recovery of the premises upon their being forfeited by the violation of the condition.

§ 27. For Breach of Condition Subsequent in Deeds—Sale of Intoxicating Liquors, etc.—A condition in a deed of conveyance that intoxicating liquors shall never be manufactured,

¹ *Deerfield v. Arms*, 17 Pick. (Mass.) (1829); *Cowell v. Colo., etc., Co.*, 100 U. S. 55 (1879); *O'Brien v. Witherall*,

² *Plumb v. Tubbs*, 41 N. Y. 442; 14 Kan. 616; *Doe v. Keeling*, 1 Maule & Gibert v. Peteler, 38 N. Y. 165; *Gray & S.* 95; see chapter 11, § 38 and notes. *v. Blanchard*, 8 Pick. (Mass.) 284

sold or otherwise disposed of as a beverage, in any place of public resort on the premises conveyed, and that if this condition be broken by the grantee, his assigns or legal representatives, the deed shall become null and void, and the title to the premises shall revert to the grantor, is not repugnant to the estate granted, nor is it unlawful or against public policy. Upon a breach of the condition, the grantor has the right to treat the estate as having reverted, and to bring an action of ejectment.¹ Such conditions subsequent, in order to be valid, must not be repugnant to the estate granted. The owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate—such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons, or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character.²

The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected, have been upheld. In this way slaughter houses, soap factories, distilleries, livery stables, tanneries and the like have been excluded from particular localities which, thus freed from unpleasant sights, noxious vapors or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed, are inoperative, would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.³

The demandant, in a writ of entry, being owner of a parcel of land with a dwelling house thereon, adjoining on the north to land with a dwelling house thereon belonging to his sister, facing to the south, conveys to the tenant's grantor in fee simple, "provided, however, this conveyance is upon the condition that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof." After the sister has conveyed her land to a

¹ *Cowell v. Colo. Springs Co.*, 100 (1829); see chapter 11, § 88 and notes. *U. S.* (10 Otto) 55 (1879); *Plumb v. Tubbs*, 41 *N. Y.* 442; *O'Brien v. S.* 55 (1878).

Witherall, 14 *Kan.* 616; *Doe v. Keeling*, 1 *Maule & S. (Eng.)* 95; *Gray U. S.* (10 Otto) 55 (1879).

v. Blanchard, 8 *Pick. (Mass.)* 284

stranger, the tenant mortgages by a deed reciting the foregoing provisions, and afterward, while remaining in possession, makes windows in the north wall; it was held that the above clause was a condition and not a covenant, that it was a valid condition and that such breach of it worked a forfeiture of the estate and gave the demandant a right to re-enter. *Gray v. Blanchard*, 8 Pick. (Mass.) 284 (1829).

§ 28. **Mines and Mining Rights—The General Rule Stated by Bainbridge.**—It might certainly be contended when mines form a distinct inheritance, that the action of ejectment is possessory; that the object of contention must, at least, be such as to be capable of actual possession from the delivery of the sheriff; that all the excavated parts would be of an incorporeal nature, or, at any rate, would become part of the general freehold, through which a mere right of way would be permissible; and that all the portions which are severed instantly lose the character of land and become mere personal chattels. Such an action would certainly not seem to correspond, in such a case, with its exact definition. But in this, as in some other instances, the action of ejectment has been carried beyond its original limits.¹

§ 29. **The Law Stated by Adams.**—When a grant of mines is so worded as not to operate as an actual demise, but only as a license to dig, search for and take metals and minerals within a certain district during the term granted, it seems that a party claiming under such a grant and who shall open and work and be in actual possession of any mines, may, if ousted, maintain ejectment in respect of them, but he can not maintain ejectment either in respect of mines within the district which he has not opened, or which, having opened, he has abandoned.²

§ 30. **Mining Rights and Privileges.**—We have seen that the action of ejectment will not lie for the recovery of an easement or an incorporeal hereditament, and the question to be determined in these cases is, whether the mining right or privilege to be recovered is really a tangible interest in real property of which possession can be delivered, as a grant or demise of the mines, metals or minerals in the land, or whether it is only a mere easement, as a license to mine or search for metals or minerals or a privilege to dig in mines. For the former the action may be sustained, but for the latter it can not, the remedy being

¹ Bainbridge on Mines, 332.

v. Wood, 2 B. & A. 724; Crocker v.

² Adams on Ejectment, 22; Hanley Fothergill, 2 B. & A. 652.

by an action for damages, or perhaps, more properly, by injunction to restrain the interruption of the right. The question to be determined in these cases is often one of much difficulty and depends generally upon the circumstances of the case, the language and the subject-matter of the grant.¹

§ 31. **Mining Rights and Reservations.**—It seems to be the general, and we think the better, doctrine, that mere reservations of minerals, or such reservations with the right of mining, must always respect surface rights of support, and will not, standing alone, permit the surface to be destroyed without some additional statutory or contract authority, and that statute authority will be construed carefully to prevent the destruction of surface rights.² But it seems also that easements to do such acts as are reasonably necessary to get out the mineral and remove it from the mine, may be granted or reserved so as to attach to the mining estate.³ Under the authorities we think that ejectment will not lie for those parts of the land necessarily occupied by shafts or other mining excavations or erections under such reservations, made and used solely for mining purposes, and that their use is in the nature of an easement which is appurtenant to the mine.⁴

§ 32. **A Coal Mine.**—The action of ejectment lies to recover the possession of a coal mine or a coal pit, for in law such a mine comprehends the ground or soil itself, and possession of

¹Grubb v. Bayard, 2 Wall. Jr. 81; Hilton v. Granville, 5 Q. B. 701; Grubb v. Grubb, 74 Pa. St. 25; Hanley v. Wood, 2 B. & Ald. 724; Muskett v. Hill, 5 Bing. (N. C.) 694; Chetham v. Williamson, 4 East, 469; Funk v. Haldeman, 53 Penn. St. 229; Crocker v. Fothergill, 2 B. & Ald. 652; Harlow v. Lake Superior Co, 36 Mich. 105; Chetham v. Williamson, 4 East, 469; Brown v. Chadwick, 7 Irish C. L. 101; Falmouth v. Alderson, 1 Gale, 441; 1 M. & W. 210; Tyrwh. & Gr. 543; Beatty v. Gregory, 17 Iowa, 109; Union Pet. Co. v. Bliven Pet. Co., 72 Pa. St. 173.

²Roberts v. Haines, 6 El. & Bl. 643; Smart v. Morton, 5 El. & Bl. 46; Harris v. Riding, 5 Mees. & W. 60; Humphreys v. Brogden, 12 Q. B. 739; Jeffries v. Williams, 1 Eng. L. & E. 423; Robotham v. Wilson, 36 Eng. L. & E. 236; 8 H. L. 348; Rogers v. Taylor, 38 Eng. L. & E. 574; Smart v. Menton, 5 El. & Bl. 46; Harris v. Riding, 5 Mees. & W. 60; Cardigan v. Armitage, 2 Barn. & C. 197; Aspen v. Siddon, L. R., 10 Ch. App. Cas. 394; Smith v. Darby, L. R., 7 Q. B. 716; Eadan v. Jeffeack, L. R., 7 Exch. 379; Ericson v. Mich. L. & I. Co., 50 Mich. 604; 16 N. W. Rep. 163 (1883).

⁴Ericson v. Mich. L. & I. Co., 50 Mich. 604.

the same may be delivered on the writ of possession, and this is true when the party has a right to mine the coal without having any title to the soil.¹

§ 33. **Rock Oil—Petroleum.**—This oil has been declared to be a mineral, like coal or any other natural product, which in its original situation forms a part of the land; and a lease which purported to confer the exclusive right to bore and dig for oil and gather and collect the same, was held to be a grant of a part of the body of the estate, and not a mere incorporeal right.² A lease granted “for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil, or other valuable mineral or valuable substances,” has been held to vest such an interest in real estate as will sustain an action of ejectment for the recovery of its possession.³

The authorities upon the question of mineral oil are confined to the courts of Pennsylvania, and do not seem to be entirely harmonious. In one case it seems to have been held that an action of ejectment is the proper remedy for the wrongful ouster of a tenant of an oil well, notwithstanding the grant under the lease may have been of an incorporeal nature.⁴ But where the owner of lands granted an exclusive right to bore for oil, reserving to himself a one-fourth interest, conditioned that in the event of profitable results, after a reasonable time for experiment, the grant was to become perpetual, otherwise the land was to revert to the grantor, the owner afterward brought ejectment, alleging that the working had not resulted profitably; but it was held that the action would not lie;⁵ and an agreement confirming “the exclusive right and privilege of boring for salt, oil or minerals” was held to grant the right to experiment for oil, and if he found any, to sever it from the land, and remove it as chattel property, but not as any part of

¹ Adams on Ejectment, 22; Bacon's Abr. Title Ejectment, D. D.; Harebottle v. Placock, Cro. Jac. 21; Andrews v. Whittingham, Carthew, 277; 1 Show. 364; 4 Mod. 143; 1 Salk. 255; Grotz v. Coal Company, 1 Luz. Leg. Reg. Rep. 53; Comyn v. Kyneto, Cro. Jac. 150; Comyn v. Wheatly, Noy, 121; Turner v. Reynolds, 23 Pa. St. 199.

² Stoughton's Appeal, 88 Pa. St. 198 (1878).

³ Barker v. Dale, 3 Pittsb. (Penn.) 190.

⁴ Karnes v. Tanner, 66 Pa. St. 297.

⁵ Rynd v. Rynd & Co., 63 Pa. St. 397.

the realty; a mere incorporeal hereditament; and that the remedy for a disturbance of his right was by an action on the case, and not ejectment.¹ The apparent want of harmony in these cases is probably owing to the peculiar conditions of the grant in each case. It is believed the general rules of law in relation to mines and minerals apply equally to mineral oil.

§ 34. **Mill Seat—Right to Erect a Mill Dam.**—A grantor, in his deed, reserved to himself, his heirs and assigns, forever, “the right and privilege of erecting a mill dam at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee or his heirs,” etc. In an action of ejectment for the recovery of the possession, it was held that the right reserved was a tangible interest in the land so that possession of it could be delivered and the action was sustained.²

There can be no doubt but that interests in land of this nature would be considered tenements within the decisions under the English settlement law, for it has been held that a right of pasturage of a dairy, of a rabbit warren, and of a fishery, carried such an interest in the land as to create a tenement. In one of the cases Ashurst, J., said that a fishery was a tenement and recoverable in ejectment. In another Lord Kenyon held that a praecipe would lie for a free warrant though the party had no further interest in the land than to enter and use the animals, and if a praecipe would lie, *a fortiori* an ejectment, which requires much less certainty, will lie. In *Wellington v. Goodtitle*, Aud. 106, it was decided in error that an ejectment would lie for a beast or cattle gate which was a right of common for a beast, and in that case the court admitted that an ejectment would lie for a common appurtenant. *Rex v. Inhabitants, etc.*, 1 T. R. 358; *Rex v. Inhabitants, etc.*, 2 T. R. 451; *Adams on Ejectment*, 24; *Runnington on Ejectment*, 131. The true rule is, whenever a right of entry exists and the interest is tangible, so that possession can be delivered, ejectment will lie. *Jackson v. Buel*, 9 Johns. (N. Y.) 298 (1812).

An illustration: The reservation of the deed in question in the case of *Jackson v. Buel*, 9 Johns. (N. Y.) 298, was in the following language: “Excepting and reserving to the said Robert McDowell, his heirs and assigns forever, the right and privilege without any fee or reward, of erecting and building a dam on the bank of a creek, near or at the place where the east line of the above granted premises crosses said creek, along the west bank of said creek about twenty rods or near where the mill seat is, to occupy and possess the aforesaid premises without any let, hindrance or molestation from the said party of the second part, his heirs or assigns, agreeably to the express condition contained in the foregoing clause and reservation,” The deed containing the reservation was made in 1797. In 1811, McDowell being dead, one of his heirs requested the defendant to let him enter on the prem-

¹ *Union Petroleum Co. v. Blivin*,
etc., Co., 72 Pa. St. 173.

² *Jackson v. Buel*, 9 Johns. (N. Y.) 298.

ises and build a dam on the creek according to the reservation, and being refused, an action of ejectment was sustained. *Jackson v. Buel*, 9 Johns. (N. Y.) 298.

§ 35. **The Right to Eject Railroad Companies May Be Lost by Acquiescence.**—Railroad and other corporations in obtaining land under the doctrine of eminent domain are subject to the rule that whenever in pursuance of law the property of an individual is to be divested by legal proceedings against his will, there must be a strict compliance with all the provisions of the law which are made for his protection and benefit. These provisions must be regarded as in the nature of conditions precedent, which must not only be complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must affirmatively show such compliance.¹ But this like other rights of a similar nature may be lost by some act of the owner amounting to an estoppel. When a railroad corporation enters upon land without right it is of course a trespasser. If the entry is without right and the possession is wrongfully withheld from the person entitled to it an action of ejectment will lie. Unless by some act or omission the owner has estopped himself from asserting his right to possession, the general right to maintain ejectment exists in all such cases, but it is a right that may be lost in various ways. In Indiana it has been established by a long line of decisions that a land owner who stands by without demanding compensation until a railroad company has so far completed and put in operation its railroad over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment to recover his land. The only remedy left to the land owner in such a case is to proceed within the proper time to have his damages assessed and enforced against the railroad company. This rule is founded upon the general principles of public policy.² In other States the rule has not been extended so far.³

¹ *Cooley on Constitutional Limitations*, 528; *Smith v. Chicago, etc., R. Co.*, 67 Ill. 191; *Chicago, etc., R. Co. v. Smith*, 78 Ill. 96; *Hyslop v. Finch*, 99 Ill. 171 (1881).

² *Louisville, N. A. & C. Ry. Co. v. Beck*, Ind. ; 26 N. E. Rep. 471; *Railway Co. v. Soltwedde*, 116 Ind.

³ *Smith v. Chicago, etc., R. R. Co.*, 257; 19 N. E. Rep. 111; *Bravard v.* 67 Ill. 191 (1873).

Ejectment will lie against a railway corporation by the owner, for land taken and used by it for the purpose of its road, where the land has not been condemned under proceedings instituted for that purpose, in the mode prescribed by the constitution and laws enacted in conformity therewith. *Smith v. Chicago, etc., R. Co.*, 67 Ill. 191 (1873).

§ 36. **Owner of Lands Taken Under the Eminent Domain Act, When?**—If the owner of land on which a school house lot has been located, petitions, under the Mass. Gen. Sts., c. 38, § 39, for a change of location and assessment of damages, and the sheriff's jury assess damages in his favor, he can not maintain a writ of entry to recover the land on account of irregularities in the taking, although he offers to waive all the proceedings before the sheriff's jury, if the court should be of opinion that he could recover back the land.¹

§ 37. **By a Tenant Against His Landlord.**—When a person leases premises to another by a parol lease, and afterward before the lessee gets possession, leases the same premises to another person and puts him in possession, the first lessee may bring an action of ejectment and recover possession of the premises, and this too, notwithstanding the lease in question contains no covenant for possession or quiet enjoyment.²

The lease in question was as follows:

“CHICAGO, Dec. 7, 1871.

Received of M. F. Casey (\$10) ten dollars, on rent of store on corner of Lake (No. 22) and Canal streets, which Mr. Casey is to have \$100 per month till May, 1873.

ALFRED BERRINGTON.”

§ 38. **For What the Action of Ejectment Will Not Lie.**—We have seen that the action of ejectment will not lie for any property upon which an entry can not be made or of which possession can not be delivered upon a writ of possession, as easements and incorporeal hereditaments. As a principle we think this may be relied upon as stating the general rule of law, although our courts have not always agreed as to what are easements and incorporeal hereditaments within the meaning of the rule.

The action of ejectment has been held not to lie in the following cases:

Ejectment will not lie against one not in possession of the land sought to be recovered. *Partridge v. Shepard*, 71 Calif. 470; 12 Pac. Rep. 351 (1887).

While it is true that the action of ejectment will lie to enforce a condi-

¹ *Pinkham v. Chelmsford*, 109 Mass. 225 (1872). ² *Berrington v. Casey*, 78 Ill. 317 (1875).

tion contained in a deed, yet it will not lie to enforce payment or performance of the consideration which is secured by a bond. *Krebs v. Stroub*, 116 Pa. St. 405; 9 Atl. Rep. 469 (1887).

The defendant's grantor claimed under a tax deed duly recorded. Before conveying to the defendant, the grantor had executed a written lease of the entire tract, part of which only was inclosed. The tenant was in possession, and his term had not expired when ejectment was brought against the defendant. In an amended petition the plaintiff sought to recover that part of the land which was not inclosed. *Held*, that the possession of the tenant extended to the entire tract covered by his lease, and that the plaintiff could recover no part of it under 2 Wag. St. Mo. 1872, p. 1207, Sec. 222, which gives to the holder of a tax title when the land is vacant, and not in the actual possession of any one, such a constructive possession that ejectment will lie against him by the adverse claimant. *Callahan v. Davis*, (Mo.) 15 S. W. Rep. 433; Am. Dig., 1891, 1383.

An ejectment was brought to recover land on the ground that defendant had violated the conditions of the purchase—that intoxicating liquor should not be sold on the premises. There was no written contract except a receipt given for a portion of the purchase price which stated that the deed with restriction relating to intoxicating liquors would be given on completion of payment on or before ninety days from date. This balance was not paid nor the deed delivered. *Held*, that the suit was premature inasmuch as the deed had not yet been given, and there was no such restriction or condition that could affect the bargain or the conduct of the defendants before the giving of the deed. *Jump River Lumber Co. v. Moore*, 70 Wis. 173; 35 N. W. Rep. 360 (1887).

In Georgia there can be no recovery in ejectment where the sole lessor of the plaintiff was dead when the action was brought. *Head v. Driver*, 79 Ga. 179; 3 S. E. Rep. 621 (1887).

In an action by the children of R.'s first wife to recover from the children of his second wife certain land which they allege R. held as tenant by the courtesy in the right of his first wife, it appeared that R. entered on the land under a title bond from said wife's father, who had no title, purchased the elder grant, and took a conveyance to himself; that the land, when he entered, was worth little, and that he paid as much or more than that little to acquire title; that R. conveyed the land to defendants as an advancement, having already made advancements to plaintiffs. *Held*, that a judgment for defendants was proper. *Woolfolk v. Richardson* (Ky.), 10 S. W. Rep. 320 (1889).

Where a land contract provided that if the vendee, who was to take immediate possession and pay the balance of the purchase price in three years, made default in payment, he should forfeit both lands and the sums paid, ejectment could not be maintained without prior notice of forfeiture. *Getty v. Peters*, 82 Mich. 661; 46 N. W. Rep. 1036 (1891).

One claiming title through a sale of land on a judgment can not sue in ejectment, and to quiet title as against the person holding the title through a sale on a decree foreclosing a tax lien, without first redeeming from such sale. *Jenkins v. Newman*, 122 Ind. 99; 23 N. E. Rep. 683 (1891).

Ejectment will not lie by the devisee of one tenant in common against the other tenant to recover land in which each holds the legal title to designated interests, but which is really the property of a partnership existing

between such tenant, purchased for the use of the firm, and paid for with its funds. *Rank v. Grote*, 110 N. Y. 12; 17 N. E. Rep. 665 (1888).

Plaintiff took possession of lands under void tax deeds. His tenant at will surrendered possession to defendant. In ejectment, defendant showed an equitable interest in the land unconnected with plaintiff's claim of title. *Held*, that plaintiff's only remedy would be to recover possession by summary proceedings. *Shaw v. Hill*, 79 Mich. 86; 47 N. W. Rep. 247 (1890).

A vendee who is in possession of land under a title bond, but who has failed to pay the price can not be ejected in an action at law, since he is the equitable owner of the land, and under his bond for title must be treated as the holder of the fee subject to the vendor's lien. *Morton v. Dickson*, (Ky.) 14 S. W. Rep. 905; Am. Dig. 1891, 1390.

The action does not lie against a person in possession of real estate under a contract of sale with A, the owner, by the lessee of a subsequent vendee of A, without a demand of possession. *Stackhouse v. Doe*, 5 Blackf. (Ind.) 570; 5 U. S. Dig. 135.

Or upon a joint demise by husband and wife, when the title was in the husband alone. *Tucker v. Vance*, 2 A. K. Marsh. (Ky.) 458; 5 U. S. Dig. 135.

It does not lie when plaintiff's right to enter is barred by the statute of limitation. *Harbaugh v. Moore*, 11 Gill & J. (Md.) 283; 5 U. S. Dig. 135.

Nor where there was a concession of a lot of land in St. Louis by the Spanish government, for the purpose of quarrying stone, and proof that the grantee used it for that purpose. *Clark v. Brazeau*, 1 Mo. 290; 5 U. S. Dig. 135.

Nor against minors, upon the possession of their guardian. *Spitts v. Wells*, 18 Mo. 468; 5 U. S. Dig. 135.

The action does not lie by the owner of the reversion or remainder upon the ground that the owner of the life estate has forfeited that estate by the commission of waste. *Patrick v. Sherwood*, 4 Blackf. (U. S.) 112; 5 U. S. Dig. 135.

Nor against a mere trespasser on the ground of prior possession alone; unless the possession has continued twenty years. *Jefferson v. Howell*, 1 Houst. (Del.) 178; 5 U. S. Dig. 135.

It does not lie by a person, on a demise, if his lessor is dead at the date of the demise; nor on a demise from a party having no title at the beginning of the suit; nor on a demise from an administrator appointed by a court, which had no jurisdiction to grant the letters of administration. *Goodtitle v. Roe*, 20 Ga. 133; 5 U. S. Dig. 135.

Nor by an assignee of a mortgage where he claims to be the owner in fee simple. *Spur v. Haddock*, 31 Ill. 439; 5 U. S. Dig. 135.

Where parties have exchanged land, but deeds are not delivered pursuant to agreement, ejectment will not lie to recover the land for such failure, without notice and an offer to rescind the contract. *Maynard v. Cable*, *Wright*, (Ohio) 18; 5 U. S. Dig. 135.

A *prochein ami* can not make a demise to sustain an action of ejectment. *Massie v. Long*, 2 Ohio, 287; 5 U. S. Dig. 135.

Ejectment in the nature of a bill in equity to compel payment for improvements made during possession under a condemned title, can not be maintained. *Paull v. Eldred*, 29 Pa. St. 415; 5 U. S. Dig. 135.

A agreed to sell land to B subject to a mortgage debt of A's. The land

was sold by the sheriff and came to B's hands. It was held that A could not by ejectment compel B specifically to perform the contract. *Thompson v. Adams*, 55 Pa. St. 479; 5 U. S. Dig. 135.

When the terms of an executory contract have been fulfilled by the vendee, and he has received a conveyance of the property, an action of ejectment will not lie by the grantee of a sheriff who has sold such property, on a judgment docketed against the devisee on such contract subsequently to the making thereof, but prior to its performance. *Smith v. Gage*, 41 Barb. (N. Y.) 60; 5 U. S. Dig. 135.

A leased land to B for a year, and during the year, while B was in possession, sold the land to C, whereupon C brought ejectment against B. It was held that the action would not lie, as C, at the date of the demise, had no right of entry. *Price v. Osborne*, 12 Ired. (N. C.) L. 26; 5 U. S. Dig. 135.

A suit in ejectment against a municipal corporation can not be sustained by showing that at the time of its commencement the *locus in quo* was in use as a public street; such use is inconsistent with actual occupancy by the defendant, and proves no claim of ownership or of interest beyond a mere easement of passage not incompatible with the title or possession of the plaintiff. *Cowenhoven v. Brooklyn*, 38 Barb. (N. Y.) 9; 5 U. S. Dig. 135.

The grading, paving and cleaning of streets by the corporation shows only that they claimed an easement for the public upon the land, and are no evidence of a claim to any title to, or interest in, the land itself. *Cowenhoven v. Brooklyn*, 38 Barb. (N. Y.) 9; 5 U. S. Dig. 135.

The action does not lie for the recovery of possession of land where there has been a contract for the sale thereof, the purchase money paid, and possession delivered in pursuance thereof. *TibEAU v. TibEAU*, 19 Mo. 78; 5 U. S. Dig. 136.

Or to recover possession of land by one claiming only an equitable estate, if the legal estate be outstanding. *Thompson v. Lyon*, 33 Mo. 219; 5 U. S. Dig. 136.

In New Jersey it does not lie to recover an incorporeal hereditament. *Dew v. Craig*, N. J. L. (3 Green.) 191; 5 U. S. Dig. 136.

In New York and Pennsylvania to recover dower until it has been assigned. *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167; 5 U. S. Dig. 136; *Jones v. Hallopeter*, 10 Serg. & R. (Penn.) 326.

It does not lie by one claiming title to the freehold of the street against a railroad company, which had laid its rails through the streets of a city, and runs its cars and locomotives thereon, without any claim of title or interest in the street beyond such use, the public using the street at the same time in the ordinary way; it is not such an "actual occupant" as is intended by 2 N. Y. Rev. Stat. 304, § 4, to authorize such an action; such acts of the company do not amount to a claim of "title to, or interest in, the premises," under the last section of the statute. *Redfield v. Utica & Syracuse Railroad Co.*, 25 Barb. (N. Y.) 54; 5 U. S. Dig. 136.

It does not lie against one not in the occupancy of land, but simply claiming an easement in it. *Child v. Chappell*, 9 N. Y. (5 Seld.) 246; 5 U. S. Dig. 136.

Or to recover possession of real estate against a person who has not been in possession thereof, nor received the rents and profits since the plaintiff

acquired a title thereto. *Van Horne v. Everson*, 13 Barb. (N. Y.) 523; 5 U. S. Dig. 136.

Or against a mortgagee in possession for condition broken—in New York. *Bolton v. Brewster*, 32 Barb. (N. Y.) 389; 5 U. S. Dig. 136.

It does not lie where the defendant claims and enjoys only an easement to flow the land; and subject to this easement the plaintiff has undisputed control over the premises. *Wilklow v. Lane*, 37 Barb. (N. Y.) 244; 5 U. S. Dig. 136.

Or against a person for the erection of a building on his own land, but so that the eaves or gutters projected over the adjoining land of a neighbor. *Aiken v. Benedict*, 39 Barb. (N. Y.) 400; 5 U. S. Dig. 136.

Or by an assignee of the purchaser of land under an executory contract of sale, who takes the assignment as security for the payment of a debt. *Campbell v. Swan*, 48 Barb. (N. Y.) 109; 5 U. S. Dig. 136.

It does not lie by the vendor against the vendee of land to enforce payment of the purchase money, where a conveyance is made and a bond taken back to secure payment. *Megargel v. Saul*, 3 Whart. (Pa.) 19; 5 U. S. Dig. 136.

Or by a widow to recover her interest in lands belonging to her husband in his lifetime. Nor by the husband in his own name to recover lands belonging to his wife. *Bratton v. Mitchell*, 7 Watts (Pa.), 113; 5 U. S. Dig. 136.

Or to enforce the support of a testator's widow, charged upon land devised to his son; nor if the son has alienated the land. *Craven v. Bleakney*, 9 Watts (Pa.), 19; 5 U. S. Dig. 136.

It does not lie to enforce payment of rent reserved on a ground rent in fee; distress is the remedy. *Kenegé v. Elliott*, 9 Watts (Pa.), 258; 5 U. S. Dig. 136.

Or against a wrong-doer, with title, to restore possession. *Prutzman v. Ferree*, 10 Watts (Pa.), 143; 5 U. S. Dig. 136.

Or for a life estate after the death of the tenant for life. *Hamilton v. Overseers of Whitely*, 12 Pa. St. 147; 5 U. S. Dig. 136.

For land of which the plaintiff is himself in possession. *Kribbs v. Downing*, 25 Pa. St. 399; 5 U. S. Dig. 136.

Or in favor of one who was wrongfully ousted, if he has not a present right of possession. *Heffner v. Betz*, 32 Pa. St. 376; 5 U. S. Dig. 136.

It does not lie to recover land by a landowner who has obtained a verdict, and judgment for land taken by the State in the construction of the canal, in a proceeding instituted in 1859, against the vendees of the State, under Pa. Act, April 21, 1857, after the execution issued upon that judgment is returned "*nulla bona*." *North Branch Canal Co. v. Hireen*, 44 Pa. St. 418; 5 U. S. Dig. 136.

Or to enforce a consideration of a deed of land, which amounted to a covenant. *Perry v. Scott*, 51 Pa. St. 119; 5 U. S. Dig. 136.

Or against the administrator to compel specific performance of his descendant's contract. *Thompson v. Adams*, 55 Pa. St. 479; 5 U. S. Dig. 136.

§ 39. **The General Rule—Tangible Property.**—When the defendant's possession of land is rightful, and the plaintiff is

not wrongfully kept out of possession, the action of ejectment can not be maintained.

For example, the owner of lands lets a railroad company into possession of a part thereof under a contract for the right of way, which the company fully performs, he can not afterward maintain an action of ejectment against the company.¹

§ 40. The Share of a Partner in Lands Owned by the Partnership Can Not Be Recovered in an Action of Ejectment.

—The action of ejectment will not lie in favor of a partner for the recovery of his undivided interest in lands belonging to the partnership, nor will it lie in favor of a purchaser at a sheriff's sale of such interest under an execution issued upon a judgment recovered against such partner. An execution may be levied on the joint property of a partnership, but this can be only for the purpose of reaching the undivided interest of the partner, against whom judgment has been recovered for an individual debt. The levy is not on his undivided share as if there were no debts or liens upon the same for any balances due to other partners; it is upon the interest only of the judgment debtor partner, if any he may have after the payment of all the partnership debts and other charges thereon. The purchaser acquires the interest of the partner upon a final adjustment of all the accounts and liabilities of the partnership.

This interest is not only an undivided interest, but it is an unascertained interest. The purchaser is substituted to the rights and interests of the judgment debtor in the property. The sale transfers no part of the joint property to him with a right of entry so as to entitle him to oust the other partners, for that would place him in a better position than the defaulting partner or judgment debtor. The remedy of the purchaser is in equity to call for an accounting, and ascertaining the interest of the judgment debtor after the settlement of the partnership liabilities and not by an action of ejectment, and

¹ Turpin v. Balt., etc., R. R. Co., 105 Ill. 11 (1882); Baker v. C. R. I. & P. Co., 57 Mo. 265; Haenbach v. Pannett v. Palmer 3 M. & K. 632; Cin., etc., R. R. Co., 20 Ohio St. 81; Beaufoot v. Patrick, 17 Beav. 60; McAuley v. Western R. R. Co.; 33 Vt. Oliver v. King, 3 D. M. & Whart. 224; 311; Stow v. Russell, 36 Ill. 23; Kil- Dilman v. Ranlan, 1 McCart. 444; gam v. Gockley, 83 Ill. 112; Gridly v. Torrey v. Camden, 3 C. E. Green, Hopkins, 84 Ill. 532; B. & O. R. R. Co. 293.

for the same reasons the action will not lie in favor of the individual partner.¹

§ 41. **By the Devisee of a Partner, etc.—Partnership Lands.**—Ejectment will not lie by the devisee of one tenant in common against the other tenant to recover the possession of land in which each holds the legal title to designated interests, but which is really the property of a partnership existing between such tenants, purchased for the use of the partnership and paid for with its funds.²

§ 42. **Against the Remainder-man.**—The action of ejectment does not lie against a remainder-man as such, during the continuance of the particular estate. The object of the action is to try the right to the present possession. The claimant can not recover unless he shows a right of entry at the time of the demise, laid in his declaration. The law does not, therefore, authorize the plaintiff to pass by the person in actual possession and make defendant a third party, who has no interest in the question of the present possession of the premises.³

§ 43. **It Does Not Lie by the Owner of Lands Unlawfully Sold and Conveyed by a Trustee.**—In jurisdictions where law and equity exist under distinct systems, legal titles are only taken into consideration in actions of ejectment. Equitable titles are not considered in the law courts. So if a trustee who may be authorized by a trust deed to sell a tract of land, buys it himself, or procures a third party to purchase it at the sale and then takes a conveyance to himself, the original owner of the land may, by proper proceedings in equity, have the sale set aside, but he can not recover the land in an action of ejectment.⁴

§ 44. **By a Sole Heir Whose Name was Omitted from the Will by Mistake.**—A child and sole heir at law, for whom a testator fails to provide by reason of mistake or accident, can not, after the will has been duly probated in the proper court, maintain an action of ejectment against the devisee named in the will to recover the land devised thereby.⁵

¹ Claggett v. Kelbourne, 66 U. S. (1 Black) 346 (1861).

⁴ The People v. Force, 100 Ill. 549 (1881).

² Bank v. Grote, 110 N. Y. 12; 17 N. E. Rep. 665.

⁵ Newman v. Waterman, 63 Wis. 612, 23 N. W. Rep. 696 (1885).

³ Sharer v. McGraw, 12 Wend. (N. Y.), 558; Adams on Ejectment, 33.

It has been held that the probate of a will could not be collaterally avoided on the ground that the will was a forgery. *Moore v. Tanner*, 5 T. B. Mon. (Ky.) 45; *Rex v. Vincent*, 1 Strange, 481; *Allen v. Dundas*, 3 Durnf. & E. 125; *Priestman v. Thomas*, 9 Prob. Div. 210.

So it has been held that a will could not collaterally be avoided on the ground that the will so admitted to probate had been secured by fraud or undue influence. *Archer v. Meadows*, 33 Wis. 167; nor that it had been revoked by the subsequent execution of another will. *Davis v. Gaines*, 104 U. S. 386, and cases there cited; but see *Waters v. Stickney*, 12 Allen (Mass.) 1, and cases there cited; nor collaterally impeached on any other ground. *Vanderpool v. Van Valkenburg*, 6 N. Y. 190; nor set aside by a proceeding in chancery. *Archer v. Meadows*, 33 Wis. 166; *Colton v. Ross*, 2 Paige, Ch. (N. Y.), 396; *Bowen v. Idley*, 6 Paige, Ch. (N. Y.), 46; *Brady v. McCascker*, 1 N. Y. 214; *Priestman v. Thomas*, 9 Prob. Div. 210.

But see cases cited in *Waters v. Stickney*, 12 Allen, 1, and *Harris v. Tiserean*, 52 Ga. 153, where, after making his will, the testator has a child born to him for whom no provision is made therein; such child has the same share in the testator's estate as if he had died intestate, and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it be apparent from the will that it was the intention of the testator that no provision should be made for such child. Sec. 2286, Rev. St. Wis.; *Breese v. Stiles*, 22 Wis. 120; *Bowen v. Hoxie*, 18 Reporter, 721; *Chicago, etc., R. Co. v. Wasserman*, 22 Fed. Rep. 872; *Willard's Estate*, 68 Pa. St. 327; *Talbird v. Bell*, 1 Desaus. (S. C.) 592; *Holloman v. Copeland*, 10 Ga. 79; *Potter v. Brown*, 11 R. I. 232; *Waterman v. Hawkins*, 63 Me. 156; *Evans v. Anderson*, 15 Ohio St. 324.

§ 45. Not in Favor of the Mortgagor's Vendee Against Purchaser at Foreclosure Sale.—In a suit to foreclose a mortgage where the mortgagor is made a defendant, the decree of foreclosure is not void for the reason that a subsequent purchaser from him is not made a party to the proceeding. The interest of such subsequent purchaser remains unaffected by the decree, but he can not maintain ejectment against the purchaser of the premises at the foreclosure sale.¹

Ejectment will not lie against a mortgagee, or an assignee of a mortgagee in possession of the mortgaged premises, when such possession was lawfully acquired after condition broken. It can not be denied that the mortgagee has an interest in the mortgaged premises, and that interest, after forfeiture, is a legal interest; it is indeed inchoate until foreclosure of his mortgage, but it has always been considered sufficient to protect him in the possession of the mortgaged premises, when legally obtained. *Phyfe v. Riley*, 15 Wend. (N. Y.) 248; *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100.

For a further discussion of this matter see mortgagor and mortgagee.

§ 46. For Lands Previously Dedicated, etc.—Where lands

¹ *Kilgour v. Wood*, 64 Ill. 345 (1872); *Watson v. Spence*, 20 Wend. (N. Y.) Frische v. Kramer, 16 Ohio, 125; 260.
Tolman v. Ely, 6 Wis. 244. But see

have been dedicated to the public for a particular purpose and the authorities appropriate them to an entirely different purpose, it may afford ground for the interference of a court of chancery to compel a speedy execution of the trust by restraining the authorities or by causing the removal of the obstructions, but the property would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant or dedication. Ejectment for their recovery will not lie.¹

§ 47. **Lands Swallowed Up by the Sea.**—It was held in England that when the sea by gradual and imperceptible progress encroaches upon the land of a subject, the title thereby covered with water becomes vested in the sovereign power.² But this doctrine has been limited in the United States to the period during which the land remains submerged. And that when it emerged from the water by natural means, the title of the original owner according to his original boundaries, is restored, and ejectment for the recovery of the possession of such land by the public authorities will not lie.³

§ 48. **The Rule Stated by Sir Matthew Hale.**—If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or if it be by art or industry regained, the subject doth not lose his property.⁴

§ 49. **Projecting Cornices, etc., Nuisances.**—The authorities upon the question as to whether the action of ejectment will lie for encroachments upon the possessions of another by projecting cornices, overhanging eaves and gutters, leaning walls and the like, are far from being harmonious, but the rule that these interruptions of the owner's possessions are more in the nature of nuisances which may be abated as such, either by an action at law or in equity, or by the act of the party himself,

¹ *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498 (1832).

² *Murphy v. Norton*, 61 How. Pr. (N. Y.) 197.

³ *In re Hull, etc., Ry. Co.*, 5 M. & W. 327.

⁴ *De Juris Maris*; Hargrave's Law Tracts, 15.

than unlawful disseizins for which the action of ejectment will lie, seems to be supported by the weight of authority.¹

In ejectment for a strip of land four and one-half inches wide, a referee's refusal to find that plaintiff had been in possession for twenty years prior to 1864, when defendant built a barn on the land in controversy, will be sustained where it appears that the eaves of plaintiff's barn projected over the strip to defendant's old barn, but there is nothing to show that the barns had stood there for twenty years, except that method of construction and material indicated that they were old. *Silliman v. Paine*, 16 N. Y. St. Rep. 324; 1 N. Y. Sup. 75 (1888); *Saxton v. May*, 16 Johns. (N. Y.) 184; see *contra*, *Sherry v. Frecking*, 4 Duer (N. Y.) 452; *Murphy v. Bolger*, 60 Vt. 723; 15 Atl. Rep. 365 (1888).

Ejectment lies for an overhanging roof.

In a recent case in the Supreme Court of Vermont, when this question was under consideration, the contrary doctrine was sustained. The plaintiff and defendants were adjoining land owners and there was a dispute between them as to the exact location of their division line. The plaintiff did not claim that the defendants had invaded his premises upon the land itself, but that in changing the location and making repairs of their buildings, they had projected the side of a roof on a barn and on a shed some sixteen feet from the ground over the division line and over the plaintiff's land. Upon the trial, it was found that the projection of the roof as the same was built by the defendants, did extend over the division line, and slightly over the plaintiff's land. Judgment in ejectment was rendered for the plaintiff. The defendants excepted and the case went before the Supreme Court for final adjudication. In affirming the judgment of the court below, Tyler, J., said:

"The question in this case is, whether the plaintiff can maintain the action of ejectment or should have resorted to an action on the case, as for a nuisance. This action, which was originally employed in England to enable the lessee of lands, who had been ejected therefrom during his term, to recover damages therefor, was subsequently enlarged to enable him also to recover possession of the land. In later years it has been used both in England and in this country to try questions involving the title to real estate. Under our statute (Section 1247, R. L.), a person having claim to the seizin or possession of lands, tenements or hereditaments, is entitled to an action by writ of ejectment, and, if he recover judgment, it shall be for his damages and the seizin and possession of his lands. 1 Chit. Pl. 188, defines the action as sustainable for the recovery of the possession of property upon which an entry might, in point of fact, be made, and of which the sheriff could deliver actual possession, and are not in general sustainable for the recovery of property which is not tangible. Tyler on Ejectment says (page 37) that by the common law and the general rule, ejectment will not lie for anything whenever an entry can not be made, or of which the sheriff can

¹ *Aiken v. Benedict*, 39 Barb. (N. Ft. Wayne, 45 Ind. 429; 15 Am. Rep. Y.) 400; *Vrooman v. Jackson*, 6 Hun, 262; *Earl of Lonsdale v. Nelson*, 2 B. (N. Y.) 326; 2 Bla. Com. 18; *Meyer & C.* 302.
v. Metzler, 51 Cal. 142; *Grove v. City of*

not deliver possession; that it is only maintainable for corporeal hereditaments; that anything attached to the soil of which the sheriff can deliver possession, may be recovered in this action. The action of ejectment will lie whenever a right of entry exists, and the interest is of such a character that it can be held and enjoyed, and possession thereof delivered in execution of a judgment for its recovery. *Rowan v. Kelsey*, 18 Barb. 484; *Jackson v. Buel*, 9 Johns. 298. The precise question in the case at bar is whether the projection of the side of defendant's roof over plaintiff's land and sixteen feet above it, was an ouster of plaintiff's possession of his land, or a mere intrusion upon and interference with a right incident to his enjoyment of the land. Blackstone, bk. 2, p. 18, says: 'Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. * * * The word 'land' includes not only the face of the earth, but everything under it or over it.' The defendant's counsel claims that this action can not be maintained, because there was no intrusion upon the plaintiff's soil, but upon the air or space above it; while plaintiff's counsel claims the rule to be that the action will lie provided the intrusion extends over the line of plaintiff's premises, no matter how slight it is, nor how far above the soil. If the defendants had constructed their barn so that the foundation wall and the building itself had been wholly or in part over the line upon plaintiff's land, there could have been no question as to the plaintiff's right to maintain ejectment. But suppose they had built their foundation wall strictly upon their own land, but close to the line, and had projected the entire side of the building itself a few inches over the line, and above the plaintiff's land, could the plaintiff maintain ejectment for the intrusion? If not, it would be because the intrusion was not upon the land itself, but the space above it. If he could not maintain ejectment, he would be obliged to submit to the invasion, and only have his damages therefor. But the law says the land is his even to the sky, and therefore he has a right to it, and should not be compelled to part with any portion of it upon the mere payment of damages by the trespasser. A case can readily be conceived where the projection of the side of a building, or even of bay-windows by one party over land of another, would be of so great inconvenience and injury to the latter that a judgment for damages would afford no adequate compensation. But to carry the illustration one step further.

One owner of a party or division wall places upon the top thereof a cornice about two and a half inches wide, which projects over the lot of the adjoining owner; can the latter maintain ejectment? It was held in *Vrooman v. Jackson*, 6 Hun, 326, that he could not. It was also held in *Aiken v. Benedict*, 39 Barb. 400, that where one erects a building upon the line of his premises, so that the eaves or gutters project over the land of his neighbor, ejectment would not lie; that an action for a nuisance was the proper remedy—the court in that case dissenting from the doctrine of *Sherry v. Frecking*, 4 Duer, 452. A similar case to the one last cited is that of *Stedman v. Smith*, 92 E. C. L. 1. There the plaintiff and defendant occupied adjacent plots of ground, divided by a wall of which they were the owners in common. There was a shed in defendant's ground contiguous to the wall, the roof of which rested on the top of the wall, across its whole width. Defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a wash-house contig-

uous to the wall where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall; and he set a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him. It was held that on these facts a jury might find an actual ouster by defendant of plaintiff from the possession of the wall, which would constitute a trespass upon which plaintiff might maintain an action against defendant. This case is in point, as showing a disseizin of the plaintiff's possession, rather than a mere infringement of a right. In *McCourt v. Eckstein*, 22 Wis. 153, it was held that where some of the stones of defendant's foundation wall projected eight inches over plaintiff's land, the plaintiff might treat this as a disseizin, rather than a trespass, and might maintain ejectment. It clearly is not essential that the intruding object should actually rest upon the plaintiff's soil to entitle him to the action of ejectment, for this action will lie for an upper room in a dwelling house or other building as the law gives the owner of the land all above it, within its boundaries. We can find no reason resting in principle, why, for the projection by one party of a portion of his building over the land of another, as in this case, he may not be liable in ejectment. The plaintiff was disseized of his land, and the defendants were in the wrongful possession thereof by his projecting roof. *Chamberlain v. Donahue*, 41 Vt. 306. * * * Judgment affirmed." *Murphy v. Bolger*, 60 Vt. 723; 15 Atl. Rep. 365 (1888).

Brief of counsel for plaintiff.

Ejectment is, in general, by the common law, only sustainable for the recovery of the possession of real property, upon which, in point of fact, an entry might be made, and of which the sheriff could deliver actual possession. 1 Chit. Pl. 188; Tyler, Ej., 37. Ejectment was held the proper remedy for space above the land, as where an adjoining roof overhangs it, upon the principle that the land embraces all above and below it to an indefinite extent. *Sherry v. Frecking*, 4 Duer, 452. This was disapproved in *Aiken v. Benedict*, 39 Barb. 400, showing an even balance in the court of New York. Also for a chamber without land. *Otis v. Smith*, 9 Pick. 297; *Ezzard v. Mining Co.*, 58 Amer. Rep. 447; *Sedg. & W. Tr. Title Land*, 44, 49. Also for oil wells and veins of minerals. *Wacker v. Straub*, 88 Pa. St. 32; *Stoughton's Appeal*, Id. 198.

Brief of counsel for defendants.

The action of ejectment will lie only for real property, as land, or something annexed to land, upon which an entry might in fact be made, and of which the sheriff could deliver actual possession. 2 Crabb, Real Prop., § 2484; Tyler, Ej., 37; 3 Bac. Abr. 273; *Puter. Pl.*, 604; *Rowan v. Kelsey*, 18 Barb. 484; *Jackson v. May*, 16 Johns. 184; *Child v. Chappell*, 9 N. Y. 246. Ejectment lies to recover possession where the sheriff can give possession. *Patch v. Keeler*, 27 Vt. 252; *R. L.* § 1247. But here a sheriff can do nothing with a writ of possession but abate a nuisance.

It lies only for property that is tangible. 2 Bouv. Inst., §§ 3654, 3657. The wrong must amount to an ouster. Id. § 3659; Tyler, Ej., 83; *Cooley v. Penfield*, 1 Vt. 244; *Stevens v. Griffith*, 3 Vt. 448; *Skinner v. McDaniel*, 4 Vt. 418; *Chamberlin v. Donahue*, 41 Vt. 306. We find but a single case that sustains the plaintiff's position (*Sherry v. Frecking*, 4 Duer, 452), and that

was overruled by *Aiken v. Benedict*, 39 Barb. 400. See *Vrooman v. Jackson*, 6 Hun, 326. The only remedy is an action of the case for the injury. *Wood, Nuis.*, § 105; *Tyler, Ej.*, 38; *Reynolds v. Clarke*, 2 Ld. Raym. 1399. Ejectment will not lie against one claiming an easement in land. *Washb. Easem.*, 693. Nor will a writ of entry. *Smith v. Wiggins*, 48 N. H. 109. The right to use water in a stream can not be determined in a real action. *Hobbs v. Gould*, 10 Atl. Rep. 457. Turning a stream of water upon another's land does not constitute an ouster. *Perrine v. Bergen*, 14 N. J. Law; 355.

§ 50. **Easements and Incorporeal Hereditaments.**—The action of ejectment does not lie for an easement as an incorporeal hereditament. This rule is founded upon the principle that the action only lies for something tangible, so that in case of a recovery the possession of the property may be delivered to the plaintiff on a writ of possession.¹

§ 51. **What Have Been Held to be Easements and Incorporeal Hereditaments.**—A ferry right,² a demise by a municipal corporation to an individual to collect wharfage,³ a license to mine,⁴ a grant or privilege to dig coal or carry ore from the land of another,⁵ a privilege to dig in mines,⁶ a mere right of way,⁷ a right to a road,⁸ a right of common by itself,⁹ land burdened with the servitude of a party wall¹⁰ are, in legal consideration, not tangible property, and for the recovery of which the action of ejectment will not lie.

The current of modern authority, in regard to easements of right of way, etc., is strongly in favor of upholding the right to recover in ejectment the land subject to the easement. *Rogers v. Sinsheimer*, 50 N. Y. 646; *Goodtitle v. Alker*, 1 Burr. 133.

¹ *Northern Turnpike Co. v. Smith*, 15 Barb. (N. Y.) 355; *Judd v. Leonard*, 1 Chap. 204; *Child v. Chappell*, 9 N. Y. 246; *Black v. Hepburn*, 2 Yeates (Pa.), 331.

² *Mayor, etc., v. Union Ferry*, 55 How. Pr. (N. Y.) 138; *State v. Wilson*, 42 Mo. 9; *Bowman v. Wathen*, 1 How. (U. S.) 189; *Rees v. Lawless*, Litt. Sel. Cas. (Ky.) 184.

³ *Mayor, etc., v. Mabie*, 13 N. Y. 151.

⁴ *Harlow v. Lake, etc., Co.*, 36 Mich. 105; *Crocker v. Fothergill*, 2 B. & A. 650.

⁵ *Grub v. Grub*, 74 Pa. St. 25; *Grub v. Bayard*, 2 Wall. Jr. (U. S.) 81.

⁶ *Beatty v. Gregory*, 17 Iowa, 109; *Union Pet. Co. v. Bliven Pet. Co.*, 72 Pa. St. 173.

⁷ *Northern Turnpike Co. v. Smith*, 15 Barb. (N. Y.) 355.

⁸ *Wood v. Truckee, &c., Co.*, 24 Cal. 474.

⁹ *Barton v. Hampshire*, 3 Keb. 738; *Freem.* 447.

¹⁰ *Robinson v. Gunnis*, 2 W. N. C. (Pa.) 224; see *Kurkel v. Haley*, 47 How. Pr. (N. Y.) 75; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Brondage v. Warner*, 2 Hill (N. Y.) 145; *contra*, *Trotter v. Simpson*, 5 C. & P. 51; *Bradbury v. Cony*, 59 Me. 494.

§ 52. **Grants of Privileges—When to be Determined by Actual Location.**—The general rule is that an action of ejectment will lie for anything attached to the soil, of which the sheriff can deliver possession, but the grant of a privilege to erect a machine and building upon land without defining the place they are to be erected, or the quantity of ground which is to be occupied, does not, without an actual entry and location, confer such a right as to enable the grantee to maintain the action. His interest can not be defined by metes and bounds, otherwise than by an actual location.¹

§ 53. **Against a Beneficiary Under a Will.**—When real property is devised to a person and charged with the support of another person during life, one who claims title by a sheriff's deed, under a sale, upon foreclosure of a mortgage executed to him by the devisee, can not maintain ejectment against the person with whose support the land is charged.²

§ 54. **Water-courses, etc.**—An action of ejectment will not lie for a water-course or rivulet, though its name be mentioned, because it is impossible to deliver possession of a thing which is transient and always running. But if the land over which the water-course or rivulet runs belongs to the claimant, the water-course may be recovered by bringing the action for so much land, by its proper description, covered with water.³

§ 55. **When the Action Will Lie—Statutory Provisions.**

(1) ALABAMA.

SECTION 2694. *Action of ejectment.* A plaintiff suing for the recovery of lands, or of the possession thereof, has an election to proceed by an action of ejectment, as is provided in the succeeding section.

Sec. 2696. *Action in the nature of ejectment.* An action for the recovery of lands, or the possession thereof, in the nature of an action of ejectment, may be maintained without a statement of any lease or demise to the plaintiff, or ouster by a casual or nominal ejector; and the complaint is sufficient if it alleges that the plaintiff was possessed of the premises, or has the legal title thereto, properly designating or describing them, and

¹ Jackson v. May, 16 Johns. (N. Y.) 184 (1819).

² Adams on Ejectment, 22; Chancellor v. Thomas, Yelv. 143; 1 Brown,

³ Castor v. Jones, 107 Ind. 283; 6 N. 142, E. Rep. 823.

that the defendant entered thereupon, and unlawfully withholds and detains the same.

Code of Alabama, 1886, ch. 6, § 2695, 2696; *Williams v. Hartshorn*, 30 Ala. 211; *Russell v. Erwin*, 38 Ala. 44; *Tarver v. Smith*, *Ib.* 135; *Harrison v. Farmer*, 76 Ala. 157; *Morris v. Bebee*, 54 Ala. 304.

(2) ARKANSAS.

SECTION 2626. *Actions for the recovery of real property—In what case the action may be maintained.* The person from or through whom the defendant claims title to the premises may, on his motion, be made a co-defendant.

Sec. 2627. *In what case action may be maintained.* Such action may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises.

Sec. 2628. *Same.* It may also be maintained in all cases where the plaintiff claims possession of the premises under or by virtue of:

First. An entry made with the register and receiver of the proper land office of the United States.

Second. A pre-emption right under the laws of the United States.

Third. Where an improvement has been made by him on any of the public lands of the United States, whether the lands have been surveyed or not, and where any person other than those to whom the right of action is given by the preceding clauses of this section is in possession of such improvement.

Sec. 2629. *Same.* The executor or administrator of any person who may have made improvements on any of the public lands of the United States, whether he had a right of pre-emption to such improvements or not under the laws of the United States, or whether the lands on which such improvements may have been made have been surveyed or not, may maintain an action for the recovery of such improvement to the same extent and with the same restrictions as provided by the preceding section for their testator or intestate.

Sec. 2630. *Same.* It may be instituted upon patent certificates issued by the recorder of land titles for Missouri territory, upon New Madrid locations, and maintained against defendants not having a better title.

Sec. 2631. It may be maintained in all cases when the

plaintiff claims possession of the premises under or by virtue of an entry made with the proper swamp land agent or land agent of the proper land office of the State of Arkansas, and the patent certificates granted by any of the aforementioned officers shall be evidence of title in the party to whom it is granted.

Digest of the Statutes of Arkansas, chapter 55, page 950.

(3) COLORADO.

SECTION 265. *In what case action lies—Concurrent remedies.* An action to recover possession of real property may be brought in any case where an action of ejectment and writ of right might have been brought at common law, and in any case where the plaintiff claims a legal estate in real property or lands, in fee or for life, or for years, or claims the legal right to occupy and possess the same. *Provided, however,* in all actions relating to the possession of real estate, those of forcible entry and unlawful detainer shall be deemed and held concurrent remedies herewith, and may be prosecuted in accordance with the law of this State relating to forcible entry and detainer.

Civil Code, Colo., laws 1887, 173.

(4) DAKOTA.

SECTION 5449. *Action to determine adverse claim to real property.* An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Dak. Comp. Laws, 1887, ch. 29.

(5) DELAWARE.

SECTION 1. *Mode of trying title to lands.* The legal title to lands, or any tenements whereon entry can be made, may be tried in an action of ejectment, and no objection shall be made to the form of action, or to the right of the lessor of the plaintiff to make the demise, if he could recover the premises in any form of action.

Statutes Del., ch. 119, page 706.

(6) ILLINOIS.

SECTION 1. The action of ejectment shall be retained, and

may be brought in the cases and the manner heretofore accustomed, subject to the provisions hereinafter contained.

Sec. 2. It may also be brought: 1st. In the same cases in which a writ of right may now be brought by law, to recover lands, tenements or hereditaments, and by any person claiming an estate therein, in fee for life or for years, either as heir, devisee or purchaser.

Sec. 3. In all cases in which any person has heretofore entered upon and occupied, or shall hereafter enter upon and occupy any lands, tenements or hereditaments within this State, by virtue of any lease or permit from the United States or this State, such person, his, her or their heirs or assigns, may have and maintain an action of ejectment against any person who has or may enter upon such lands, tenements or hereditaments without the consent of such lessee, his, her or their heirs or assigns; and proof of the right of possession shall be sufficient to authorize a recovery.

R. S. Ill. 1889, p. 596.

(7) INDIANA.

SECTION 1050. *Action for possession.* Any person having a valid, subsisting interest in real property and a right to the possession thereof, may recover the same by action to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein.

R. S. Ind. 1881, article 38, Ejectment.

(8) IOWA.

SECTION 3245. *By ordinary proceedings; counter claim.* Actions for the recovery of real property shall be by ordinary proceedings, and there shall be no joinder and no counter claim therein, except of like proceedings, and as provided in this chapter.

2 McClain's Statutes, p. 857.

(9) MAINE.

SECTION 1. *Recovery of estates by writ of entry; mode of entry.* Any estate of freehold, in fee simple, fee tail, for life, or any term of years, may be recovered by writ of entry; and such writs, and the writ in the action of dower, shall be served by

attachment and summons, or copy of the writ, on the defendant, but if he is not in possession, the officer shall give the tenant in hand, or leave at his place of last and usual abode, an attested copy of the writ; and if the defendant is not an inhabitant of the State, the service on the tenant shall be sufficient notice to the defendant, or the court may order further notice.

(10) MASSACHUSETTS.

SECTION 1. *Estates of freehold may be recovered by writ of entry.* All estates of freehold, whether in fee simple, fee tail, or for life, may be recovered by a writ of entry upon disseizin, unless a different action is prescribed by law.

R. S. Mass. 1882, page 1017.

(11) MICHIGAN.

SECTION 1. *Ejectment retained.* The action of ejectment is retained, and may be brought in the cases and in the manner heretofore accustomed, subject to the provisions hereinafter contained.

Sec. 2. *Extended to other cases.* The action of ejectment may also be brought:

1. In the same cases in which writ of right may now be brought by law to recover lands, tenements or hereditaments, and by any person claiming an estate therein, in fee or for life, either as heir, devisee or purchaser.

2. By any widow entitled to dower, or by a woman so entitled and her husband, after the expiration of six months from the time her right accrued, to recover her dower of any lands, tenements or hereditaments.

R. S. Mich. 1882, Ch. 269.

(12) MISSOURI.

SECTION 4626. *When it may be maintained generally.* An action for the recovery of the possession of premises may be maintained in all cases where the plaintiff is legally entitled to the possession thereof. (R. S. 1879, 2240—a.)

Sec. 4627. *Id. in particular cases.* An action for the recovery of the possession of land may also be maintained against any person not having a better title thereto, in all cases

where the plaintiff claims possession thereof under or by virtue of: First, an entry or boundary land warrant location with the register and receiver of any land office of the United States, or with the commissioner of the general land office thereof; or, second, an entry with the register and receiver of any land office in this State; or, third, a pre-emption right, under the laws of the United States, or of this State; or, fourth, a New Madrid location; or, fifth, a confirmation made under the laws of the United States; or, sixth, a land scrip location made in virtue of the laws of this State; or, seventh, a French or Spanish grant, warrant or order of survey, surveyed by proper authority, under the French or Spanish government, and recorded according to the usages of the country prior to the 10th of March, 1804. (R. S. 1879, S. 2241—b.)

R. S. Mo. 1889, Ch. 59.

(13) NEW YORK.

SECTION 1. The action of ejectment is retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions hereinafter contained.

Sec. 2. It may also be brought:

1. In the same cases in which a writ of right may now be brought by law, to recover lands, tenements or hereditaments; and by any person claiming an estate therein, in fee or for life, either as heir, devisee or purchaser.

2. By any widow entitled to dower, or by a woman so entitled and her husband, after the expiration of six months from the time her right accrued, to recover her dower, of any lands, tenements or hereditaments.

2 R. S. N. Y. 1849, p. 399.

(14) OREGON.

SECTION 316. *Action to recover real property; by and against whom maintainable.* Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof.

R. S. Oreg., Ch. IV, Title 1.

(15) TENNESSEE.

SECTION 3953. *Ejectment.* Any person having a valid, subsisting legal interest in real property, and a right to the immediate possession thereof, may recover the same by an action of ejectment.

Milliken & Vertrie's Code Tenn., Title 2, Ch. 1, page 762.

(16) TEXAS.

ARTICLE 4784. *Method of trying titles to land, etc.* All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to lands, tenements or other real property shall be by action of trespass to try title.

R. S. Texas, 1879, Ch. 1, Title 96, page 703.

(17) WISCONSIN.

SECTION 3073. *Action of ejectment.* Actions for the recovery of specific real property or of the possession thereof, with damages for the withholding thereof, are styled actions of ejectment, and may be commenced and proceeded in as other civil actions are, except as hereinafter provided in this chapter.

R. S. Wis. 1878, Ch. 133.

CHAPTER III.

THE PARTIES LITIGANT IN EJECTMENT.

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- 3. The Nature of the Plaintiff's Title.
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- 46. Parties to Actions—Statutory Provisions.

§ 1. **The Parties.**—In proceedings to recover the possession of land and tenements, as in nearly all other judicial proceedings, there are two parties. The party who seeks to recover the possession of the premises in question is called the plaintiff, and the party who resists it is called the defendant. In ejectment there is nothing necessarily different as regards the parties to the action from the rules governing parties to other actions in general.

§ 2. **Plaintiffs in Ejectment.**—As a general rule the proper person to be the plaintiff in actions for the recovery of the possession of real property is he who has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession or some share, interest or portion thereof.

The rules of law governing parties to the action of ejectment will be necessarily discussed to some extent under different heads, into which the general subject is divided. As, for example, in the chapters on ejectment between vendor and vendee, mortgagor and mortgagee, landlord and tenant, etc., the characteristics of the parties to these relations are generally discussed as parties to the action of ejectment.

In this chapter the discussion is confined more especially to cases concerning persons occupying positions in which there exists no privity of estate between them, and the persons alleged to be wrongfully in possession of the premises in dispute.

§ 3. **The Nature of the Plaintiff's Title.**—The word title is here used in its ordinary signification, as denoting the plaintiff's legal, that is to say, actual right to the disputed property. Whenever the defendant has been let into possession by the lessor, or those under whom he claims, he is estopped from disputing the title in this sense of the word, although he may show its subsequent expiration, and it is only

incumbent on the claimant in such cases, to show the manner in which the defendant obtained possession, and that his right to such possession has ceased. These cases chiefly arise where the relationship of landlord and tenant has subsisted between the parties, and will be treated of in a subsequent chapter. The present consideration is limited to those cases in which it is incumbent upon the plaintiff to show some title to the possession beyond the mere right in the defendant to continue therein by reason of a privity existing between the parties.¹

§ 4. **Joinder of Causes, etc., in Ejectment.**—In the action of ejectment a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate and distinct tenement or parcel of land. As to him they are all trespassers, and he can not know how they claim, whether jointly or severally; how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to make a defense specially for such portion of the lands as he claims, and by doing so he necessarily disclaims any title to the residue of the land described in the declaration, and if on the trial he succeeds in establishing his title to so much of it as he has taken defense for, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with others, or himself made liable for costs unconnected with his separate litigation.

If he pleads nothing but the general issue, and is found in possession of any part of the land demanded, he is considered as making defense for the whole. How can he call on the plaintiff to prove how much he claims, or the jury, to find a separate verdict as to his separate holding, when he will neither, by his pleading nor evidence, signify how much he

¹ Adams on Ejectment, 104; Sulli- R. 682; Doe v. Ramsbottom, 3 M. & van v. Stradling, 2 Wils. 208; Driver S. 516; Doe v. Watson, 2 Star. 230; v. Lawrence, Blk. 1259; Parker v. Baker v. Mellish, 10 Ves. Jun. 544; Manning, 7 T. R. 537; Hodson v. Gravenor v. Woodhouse, 1 Bing. 38; Sharpe, 10 East, 355; Doe v. Mitchell, Phillips v. Pearse, 5 B. & C. 433. 1 B. & B. 11; England v. Slade, 4 T.

claims? These were facts known only to himself and with which the plaintiff had no concern and the jury no knowledge. If a general verdict leaves each one liable for all the costs, it is a necessary consequence of their own conduct, and no one has a right to complain.¹

§ 5. **Joinder of Tenants in Common, Joint Tenants and Coparceners.**—The common law rule which permitted tenants in common, joint tenants and coparceners to maintain the action of ejectment, required them to join in the action, and this rule is probably in force in the United States where it has not been changed by statutory enactments.² We quote the Statute of Illinois as a fair illustration of these statutes.

Any two or more persons claiming the same premises as joint tenants, tenants in common or coparceners, may join in a suit for the recovery thereof, or any one may sue alone for his share.³

§ 6. **Aliens.**—Under the English law an alien could not maintain an action of ejectment,⁴ and this rule has been recognized in some of the American States.⁵ But, in many of the States, resident aliens may acquire real estate in the same manner as native born citizens, and hold it the same as against all persons excepting the State. This being the case, it follows, as a legal sequence, that they may recover the possession of real estate in an action of ejectment.⁶

In Maryland, it is held that the title of an alien friend can not be divested but by some act done by the State to acquire the possession, and a judgment for the possession of the land in the right of the alien was upheld. *McCreery v. Allender*, 4 H. & McH. (Md.) 409.

In California, it is held that a non-resident alien can acquire title to real property by purchase, or other act of the party, though not by descent or operation of law, and until office found, no individual can question the

¹ *McGerory v. Little*, 15 Calif. 27; *Touchstone*, 204; *White v. Sabariego*, *Greer v. Mezes*, 65 U. S. (24 How.) 23 Tex. 243; *Hardy v. De Leon*, 5 Tex. 240.

² *Webster v. Vanderventer*, 6 Gray, 428 (1856); see *Hicks v. Rogers*, 4 Cranch (U. S.), 165 (1807); *Poole v. Fleeger*, 11 Pet. (U. S.) 185 (1837); *Hasbrook v. Bunce*, 62 (N. Y.) 475 (1875).

³ *Laws of Ill.* 1872, 370.

⁴ *Coke on Littleton*, 129; *Shep.*

⁵ *Barges, etc., v. Hogg*, 1 Hayw. (N. C.) 485.

⁶ *Bradstreet v. Supervisors*, 13 Wend. (N. Y.) 546; *Ford v. Harrington*, 16 N. Y. 285, 294; *Overing v. Russell*, 32 Barb. (N. Y.) 263; *Jenkins v. Noel*, 3 Stew. (Ala.) 60.

rights or title of a plaintiff on the ground of alienage or non-residence. *Norris v. Hoyt*, 18 Cal. 217; *People v. Folsom*, 5 Cal. 372.

§ 7. **Copartners.**—Real property owned by a copartnership is in general held as partnership assets upon the dissolution of the firm. As between the members the title vests in the individual partners as tenants in common.¹ The law requires that when the action of ejectment is brought to recover the possession of lands and tenements belonging to a copartnership, it must be brought in the name of all the members in whom the legal title is vested.² If it is vested in a single partner he should bring the action in his own name,³ and a surviving partner may recover in ejectment against a defendant having no title.⁴ The holding of real estate by a partner is in the nature of a trust for the partnership until the trust is discharged and then the partners hold for themselves; but the particular quantity of the estate of each partner can never be determined until the final adjustment of the partnership affairs.⁵

One partner, whatever his rights against the other members of the firm, can maintain ejectment for the whole tract of land belonging to the partnership, as against a mere intruder. *Smith v. Smith*, 80 Cal. 323; 21 Pac. Rep. 4; 22 Pac. Rep. 186 (1889).

Purchaser of a partner's share or interest in the lands of an association can not maintain ejectment for the land purchased. His remedy is in a court of equity, where an accounting can be had. *Clagett v. Kilbourne*, 1 Black (U. S.), 346.

Where the interest of a partner is sold on execution it creates a dissolution of the firm, and the purchaser becomes a tenant in common as to the realty, with the remaining partner. *Carter v. Roland*, 53 Tex. 540.

§ 8. **Corporations.**—A corporation endowed with the power and having the capacity to hold real property may, in all cases, maintain an action of ejectment to recover the possession of it, when wrongfully withheld, the same as a private person.⁶ The modern rules of law governing methods of determining the title and possession of real property, applies to corporations of every kind, whether in the character of plaintiffs or defendants.⁷

In Missouri, ejectment will lie against a county to recover land which has been wrongfully taken and converted into a public road, through the

¹ *McGrath v. Sinclair*, 55 Miss. 89.

⁶ *Henly v. Branch Bank*, 16 Ala. 552.

² *Lindley on Partnership*, 482.

⁷ *Kyd on Corporations*, 187; *Angell*

³ *Doe v. Baker*, 2 Moore, 189.

& *Ames on Corporations*, §§ 370, 631;

⁴ *Robinson v. Roberts*, 31 Conn. 145 (1862).

Society v. Wheeler, 2 Gall. (U. S.) 105.

⁵ *Parsons on Partnership*, 387.

action of the County Court, in which 2 Wag. St. Mo. 1870, p. 1218, confers authority to locate, open, and improve roads. *McCarty v. Clark County*, 101 Mo. 179; 14 S. W. Rep. 51 (1890).

Land was conveyed to certain trustees of a union meeting and school house in trust for the benefit of said meeting and school house. Afterward a school district, which was created after the land was conveyed, erected and maintained a school house on the land. *Held*, that the school district thereby acquired no title to the land, since its use of the land was merely permissive. *Common School Dist. of Main Tp. v. Richard*, (Pa.) 21 Atl. Rep. 821; Am. Dig. 1891, 42.

§ 9. **Municipal Corporations.**—A municipal corporation entitled to the possession and control of streets and public places, may, in its corporate name, recover the same in ejectment. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such an action against the adjoining proprietor or whoever may wrongfully intrude upon, occupy or detain the property. But where the adjoining proprietor retains the fee, the courts have overcome the technical difficulty by regarding the right to the possession, use and control of the property by the municipality as a legal, and not a mere equitable right.¹

Where a corporation has the legal title to the soil of the commons or public streets, it may maintain ejectment to recover the possession thereof. But Law, J., expressed, *arguendo*, the opinion that where the public or corporation have an easement only, and not the fee, the remedy for a violation of the right is not by private action, but by public prosecution. *Savannah v. Steamboat Co.*, R. M. Charl. (Ga.) 342 (1830).

Where the public acquire only the use, and the fee remains in the original proprietor or abutter, the latter is considered the owner of the soil for all purposes not inconsistent with the public rights, and may maintain actions accordingly. Thus it has been held that he may maintain ejectment against an individual who, without lawful authority, erects a private building upon a public square under a lease from the local authorities, these having no power to authorize such a use.² The recovery is, of course, subject to the public easement.

¹ 2 Dillon on Municipal Corporations, § 662. Ejectment will lie by municipal corporations, to recover the possession. "Church Grounds," *Hannibal v. Draper*, 15 Mo. 634 (1852); "Market Grounds," *Drummer v. Jersey City*, 1 Spen. (N. J.) 86 (1843); "Public Square," *Winona v. Huff*, 11 Minn. 119 (1866); *Klinkener v. School Dist.*, 1 Jones (Penn.), 444; "Town Commons," *Commissioners v. Boyd*, 1 Ired. (N. C.) 194 (1840); "Public Square," *M. E. Church v. Hoboken*, 33 N. J. L. 13 (1868).

² 2 Dillon on Municipal Corporations, § 663; citing *Stites v. Curtis*,

§ 10. **Foreign Corporations.**—It may be stated as a general rule that corporations may, by the comity of States, maintain the action of ejectment in States other than those in which they derive their charters. Under the common law an alien friend was permitted to bring his action in the courts under certain conditions, which, having been complied with, he was entitled to the same rights and privileges in the courts as the native born subject or citizen. Under the modern ideas, among States and Nations, no good reason is perceived for any distinction between artificial and natural persons. In States where foreign corporations are not permitted to hold real property, of course the rule can not apply.²

§ 11. **A Copyholder as Plaintiff.**—While the ancient practice in actions of ejectment prevailed, it seems to have been holden that a copyholder could not maintain the action upon a demise for a longer term than a year, unless the license of the lord were first obtained, or a special custom existed in the manor enabling him to make longer leases; and, in some authorities, it is even doubted whether the action can in any case be supported by a copyholder.³ But since the introduction of the modern practice, these objections are wholly obviated.⁴

A copyholder, who claims by descent as heir, may maintain ejectment without admittance, as his title is complete against all the world, except the lord, immediately upon the death of the ancestor. *Rex v. Rennett*, 2 T. R. 197; *Doe v. Rolfe*, Nev. & Per. 648; *Doe v. Crisp*, 6 Ad. & E. 779.

But if it be necessary for him to proceed against the lord for a seizure on the death of the ancestor, he must prove that he has tendered himself to be admitted at the lord's court, or that the landlord has done some act dispensing with such tender. *Doe v. Bellamy*, 2 M. & S. 87.

When the landlord grants a reversion of a copyhold expectant on a life estate, as the grantee acquires a perfect title by the grant only, he may, on the termination of the life estate, maintain ejectment without admittance. *Roe v. Loveless*, 2 B. & S. 87.

4 Day, 328; *Peck v. Smith*, 1 N. Y. Dry Dock v. Hicks, 5 McL. Conn. 103; 2 Smith Lead. Cas. 184; (U. S.) 111.

Angell on Highways, chap. VII; ² *Leasure v. U. M. L. Ins. Co.*, 91 Bissell v. Railroad Company, 23 N. Pa. St. 491; *Bank v. Ead*, 13 Pet. (U. Y. 61; *Sherman v. McKeon*, 38 N. Y. S.) 519.

266; *Pomeroy v. Mills*, 3 Vt. 279, ³ *Stephen v. Elliot*, Cro. Eliz. 483; (1830); *Bolling v. Petersburg*, 3 Rand. Goodwin v. Longhurst, Cro. Eliz. 535; (Va.) 563 (1825); *Warwick v. Mayor*, Spark's Case, Cro. Eliz. 676; *Downingham's Case*, Owen, 17; *Eastcourt v. Neal*, 28 Conn. 163; *Cooper v. v. Weeks*, 1 Lut. 799.

Smith, 9 Serg. & R. (Tenn.) 26.

⁴ *Adams on Ejectment*, 109.

§ 12. **Lessee of a Copyholder.**—The privilege of the lessee of a copyholder to maintain ejectment, seems, according to the old authorities, to have been formerly limited to those cases in which his lease was for one year only, or in which (being of longer duration) the license of the landlord had been previously obtained, or there was a special custom in the manor authorizing such leases; but it is now settled that a lessee for years, being a copyholder, may maintain ejectment, although he has not the license of the landlord, and no special custom exists authorizing such leases, for the lease gives him a good title against every one but the landlord.¹

Copyhold lands were granted to A, for the lives of herself and B, and in reversion to C, for other lives. A died, having devised to B, who entered and kept possession for more than twenty years. On his death, C brought ejectment; held, that the action was barred by the statute of limitations, for that C's right of possession accrued on the death of A, inasmuch as there can not be a general occupant of copyhold land. *Doe v. Scott*, 4 Barn. & C. 706.

§ 13. **Guardians for Nurture.**—A guardian for nurture can not maintain ejectment, for he can not make leases for years, either in his own name, or in the name of the infant. He has only the care of the person and education of the infant, and has nothing to do with the lands merely by virtue of his office.² The same rule applies also to the natural guardian.³

A guardian by nature, is the father, and on his death the mother; this guardianship extends only to the custody of the person, and continues till the child arrives at the age of maturity. *Coke on Littleton* 84, a; *Bouvier's Law Dictionary*, 571.

§ 14. **Guardians (in Socage).**—The guardian in socage of an infant, or a testamentary or other guardian having the usual powers by statute of a guardian in socage, may maintain an action of ejectment against any person entering upon the lands of his ward without right. This is held to be so for the reason

¹ *Adams on Ejectment*, 111; *Goodwin v. Longhurst*, Cro. Eliz. 535; *Doe v. Tressider*, 1 Q. B. 416. & M. (S. C.) 369; *May v. Calder*, 2 Mass. 55; *Ross v. Cobb*, 9 Yerg. (Tenn.) 463; *Combs v. Jackson*, 2 Wend. (N.

² *Magruder v. Peter*, 4 G. & J. (Md.) 323; *Bedell v. Constable*, Vaugh. 177; *Ratcliff's Case*, 3 Co. 37; *Combs v. Jackson*, 2 Wend. (N. Y.) 153; *Kinney v. Harrett*, 24 Alb. Law Jour. 216; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; *Anderson v. Darby*, 1 N. Y.) 153; *Adams on Ejectment*, 114; *Teft v. McCall*, 3 Barr. (Penn.) 256; *Holmes v. Seely*, 17 Wend. (N. Y.) 75; ³ *Ratcliff's case*, 3 Co. 37, note; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631.

that a guardian in socage has the legal custody of the land of the infant, and is entitled to the profits for his own benefit. He is in possession of such lands by right and may, therefore, maintain the action of ejectment against persons entering upon him without right. But the abolition of tenures in this country has destroyed guardianship in socage as recognized at common law. Here guardians are appointed under the statutes of all the States, and may or may not possess the same general powers in respect to the lands of their wards as were conferred upon the guardian in socage at common law.¹

A guardian in socage, under the common law, was one who had both the custody of the person of the infant and his lands; the common law gave this guardianship to the next of blood to the child to whom the inheritance could not possibly descend. It has become nearly, if not obsolete, in the United States, though in common legal parlance the term "guardian in socage" is used to designate a guardian who is entitled to the custody of the lands of his ward. 1 Bouvier's Law Dictionary, 572.

A guardian in socage has the custody of the lands of the infant, and is entitled to the profits for his benefit. He has an interest in the estate and may lease it. He may avow in his own name and bring trespass. He is in possession by right, and may, of course, maintain the action of ejectment against any person entering upon him without right. *Holmes v. Seeley*, 17 Wend. (N. Y.) 75; 3 Bac. Abr. Tit. Guardian, 403; *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66; *Jackson v. De Wals*, 7 John. (N. Y.) 157.

§ 15. **Guardian and Ward.**—As a general rule it may be stated that when a guardian is vested with the estate of his ward, he is the proper person to maintain the action of ejectment for the possession of the lands; his ward can not maintain the action in his own name;² this seems to embody the correct and logical rule though the authorities are not quite uniform.

The fact that there can exist but one entry upon the same lands at the same time, would seem to preclude the idea that the ward and his guardian can both institute and maintain separate actions for the recovery of the possession of the same lands at the same time; but if they should do so it is probable the court would, upon an application of the defendant, consolidate the action or restrain one of them by injunction, for both of them being vested with the same title, an adjudication in one case might be binding in the other.

§ 16. **The Law Stated by Adams.**—It is difficult to discover any principle upon which both infant and guardian can have

¹ *Holmes v. Seeley*, 17 Wend. (N. Y.) 75. ² *Seaton v. Davis*, 1 T. & C. (N. Y.) 91.

the right of maintaining ejectment for the same lands, but it seems, notwithstanding, that they do possess such right. In the case of *Doe d. Holsworth v. Handcock*, coram Park, J., tried at the Derby Summer Assizes, 1836, the lessor of the plaintiff was an infant, aged nineteen years, and the tenancy was proved to have been made with the plaintiff as testamentary guardian, and the learned judge ruled that the demise was properly laid, and refused to reserve the point.¹

In Canada, under the English statute, which provides that guardians shall have the charge and management of the estates of their wards, real and personal, and shall appear and prosecute or defend actions in his or her name, it was held that the guardian might maintain ejectment for the ward's lands, but the court was of opinion that the infant might also have brought the action independent of the guardian. *Doe v. McLeod*, 8 U. C. Q. B. 344, under statute 8 Geo. IV, chap. 6.

§ 17. **Grantee of a Rent-charge.**—The grantee of a rent-charge having power to enter upon the lands, if the rent be in arrear, and hold them until satisfaction, can maintain the action; but before he can enter for the non-payment of rent, he must make a demand of the precise amount due on the day on which it became due, and on the most notorious part of the land, although the possession be vacant and there be nothing to distrain.

These rights of entry are always taken strictly; and where a man gave a leasehold estate by will to B, his executors, etc., subject to a rent-charge to his wife during her widowhood,² with a power to the widow to enter for non-payment of rent, and to enjoy, etc., until the arrears were satisfied, and in case of the widow's marriage, he willed that B should pay the rent-charge to C, his executors, administrators and assigns, it was holden that C's executors, after the widow's marriage and C's subsequent death, had no right of entry for non-payment of the rent-charge.³

The payment of a lien or a charge on land, may be enforced by ejectment. *Galbraith v. Fenton*, 2 Serg. & R. (Penn.) 359; see *Walcop v. M'Kinney*, 10 Miss. 229; *Brown v. Mace*, 7 Blackf. (Ind.) 2.

But, it seems, ejectment is not the proper form of an action to recover a legacy charged on land. *Gause v. Weley*, 4 Serg. & R. (Penn.) 509.

¹ *Adams on Ejectment*, 115.

v. Cowley, 1 Saund. 112; *Hassell v.*

² *M'Cormick v. Connell*, 6 Serg. & Gowthwaite, Willes, 500; 32 Hen. (Penn.) 151.

VIII, c. 34.

³ *Adams on Ejectment*, 120; *Jemott*

Where one of two parties executed an assignment of a lease, absolute in its terms, and at the same time, gave a separate writing, to surrender the possession on a future day, and the assignee, at the same time, contracted in writing, with the assignor, to pay a sum of money on a day before the time of said stipulated surrender, it was held that on the refusal of the assignor to surrender according to his contract, the assignee might maintain ejectment for the premises without having made such payment. *Strong v. Garfield*, 10 Vt. 497.

Where A mortgaged lands to B, and A afterward leased the same lands to C, who entered under A, and while C was thus in possession as the tenant of A, paying him rent, B brought ejectment against A for such lands, it was held that the action was sustainable. *Middletown Bank v. Bates*, 11 Conn. 519.

§ 18. **Heirs and Devisees.**—(1) *Heirs*: The heirs at law of a person dying intestate may always maintain ejectment for the possession of the lands of which their ancestor died seized and possessed.¹ Prior possession of the ancestor or dying in possession and proof of heirship is in general sufficient to enable the heir to recover without producing a paper title against a person entering without title.² The heir whose ancestor dies in possession is presumed to be in possession, and he recovers on the seizin of his ancestor.³

The courts will never permit an heir to be disinherited by mere conjecture. So where the defendant took a lease of a lot for a term of years, for which he paid rent for several years, in an action of ejectment by the heirs of the lessor of the plaintiff, against the defendant, who continued to hold possession, it being shown that the original lessor was dead, and that his children and their heirs were the lessors of the plaintiff, and it being admitted that the deceased left a will, the defendant insisted that the plaintiff was bound to show the devise contained in the will. But the court held that the defendant, if he would bar the title of the heirs at law, was bound to show, affirmatively, a devise of the premises in question. *Brant v. Livermore*, 10 John. (N. Y.) 366.

But where a deed of bargain and sale recited its object to be to secure the premises to the sole and separate use of the bargainor's daughter, and conveyed them, for the consideration of one dollar moving from the bargainee, to the said bargainor and his heirs, in trust for the use of the said daughter and her heirs, she leaving children her heirs at law, it was held that said heirs at law could not maintain an action of ejectment; the legal estate still remaining in the trustee. *Bruce v. Faucett*, 4 Jones L. (N. C.) 391.

An heir and his grantees can not set up an adverse title derived from possession alone, as against a grantee of the ancestor. *Cashman v. Brownlee*, (Ind.) 27 N. E. Rep. 560, Am. Dig. (1891) 41.

¹ *Ulrick v. Beck*, 13 Pa. St. 639; ³ *Tappscott v. Cobbs*, 11 Gratt. (Va.) 172; *Buck v. Squires*, 22 Vt. 484; *Car- 172; Fosgate v. Herkimer, etc., Co.,* *ruthers v. Bailey*, 3 Kelly (Ga.), 105. 9 Barb. (N. Y.) 287.

² *Mattonnier v. Dimmick*, 4 Barb. (N. Y.) 566.

(2) *Devisees*: Devisees and heirs stand generally upon the same grounds in law, one deriving his estate by reason of the law of descents, and the other by a testamentary devise. The devisee may always maintain the action for the recovery of the devised lands. The burden is upon him to show a seizin in his testator and a valid will.¹

Where a testator devises two tracts of land, of different value, to different persons, and the devisee of the tract of inferior value elects to take the other tract by a paramount title, the devisee of the other tract may recover the tract of inferior value in ejectment; and is not obliged to resort to equity for compensation. *Lewis v. Lewis*, 13 Pa. St. 79.

§ 19. **Devisee—The Law Stated by Adams.**—Where the devise is of a freehold interest, the devisee may immediately, and without any possession, maintain ejectment for the lands devised; but if it be a legacy of a term of years, he must first obtain the assent of the executors to the bequest. When, however, such assent is obtained, the legal estate vests absolutely in the legatee, and he may maintain ejectment against the executor, as well as against a stranger.²

The devisee of land may maintain ejectment therefor, when it is obvious that no action of the Probate Court, in ordering a division, or assigning the land, can become necessary, and there is no pretense that the executor has any lien upon the land, or so long a time has elapsed that his lien will be presumed satisfied. *Abbott v. Pratt*, 16 Vt. 626.

§ 20. **Husband and Wife.**—Under the old order of things in an action of ejectment for the lands of the wife, the demise might be laid in the name of the husband alone, or in the names of the husband and wife jointly, but since the enactment of the so-called married woman's acts, the revolution has been complete. The tendency is toward the complete alienation of her property from the control of her husband. Under the New York code, she may maintain the action of ejectment for the recovery of the possession in her own name without joining her husband;³ and this is generally the rule in most of the States where similar statutes exist.

A woman, whose estate has been wrongfully aliened by her husband, may maintain the action to recover it back, after his death, and without notice or demand of possession to the occupant. *Miller v. Schackleford*, 4 Dana (Ky.) 264.

¹ *Abbott v. Pratt*, 16 Vt. 626; on *Littleton*, 240 b; *Young v. Holmes*, Broom on Parties, 199; *Barbour on Stran.* 70; *Doe v. Guy*, 3 East. 120. Parties, 247; *Coke on Littleton*, 240 b. ³ *Darby v. Callaghan*, 16 N. Y. 71.

² *Adams on Ejectment*, 119; *Coke*

Where, upon the foreclosure of a mortgage, ejectment is brought against the mortgagor, who is married, and has been in possession of the land, consisting of forty acres, occupying and claiming it as a homestead, the wife is a necessary party defendant to the suit in ejectment, notwithstanding the mortgage was for the purchase money. *Gibbs v. O'Neil* (Mich.), 48 N. W. Rep. 696; Am. Dig. (1891) 1391.

After judgment is rendered in ejectment brought against a husband, the wife can not be let in as a party defendant, on the ground that the land is hers, since no action is pending after rendition of the judgment against the husband. *Meadows v. Goff* (Ky.), 14 S. W. Rep. 535; Am. Dig. (1891) 1392.

Where land is purchased with the wife's earnings, the husband not making any claim thereto, and telling her that "everything you make is yours," it is the wife's separate property, and the husband need not be joined as plaintiff in ejectment for such land. *Von Glahn v. Brennan*, 81 Cal. 261; 22 Pac. Rep. 596 (1889).

§ 21. *Infants.*—(1) *As plaintiffs:* An infant may maintain an action in tort for an injury to his property,¹ and is always a proper plaintiff in actions of ejectment for the recovery of the possession of his lands.² The practice in such cases is a matter of local regulation. In Pennsylvania and some other States he may plead in his own name by his next friend.³

Where the right of an infant to maintain an action for the recovery of the possession of his lands is recognized, a guardian *ad litem* must be appointed, in order that some person may be before the court who can be held responsible for costs.

The courts of Ohio have held that the next friend of an infant could not make a demise to sustain the action, as he was neither attorney nor guardian, and had no power to lease the lands of an infant. *Massie v. Long*, 2 Ohio, 287.

In New York where an action was instituted in the infant's name by a guardian *ad litem*, to recover possession of lands from the tenant, for the life of another holding over his term, it was held, that the action could only be brought by a guardian in socage, or general guardian, and that a minor who had a guardian in socage had no right of action to recover the possession of his lands, or the rents and profits thereof. *Seaton v. Davis*, 1 T. & C. (N. Y.) 91.

In the same State, in an older case, it was held that an action would not lie by infants, in their own names, by a next friend, against a defendant, for intermeddling with the rents and profits of their real estate. The action must be brought in the name of the guardian in socage or general guardian. *Beecher v. Crouse*, 18 Wend. (N. Y.) 307.

¹Broom on Parties, 238; Barbour Macpherson on Infancy, 352; Doe v. on Parties, 249; Birchman v. Noright, Noden, 2 Esp. 530.

Hardw. 51; O'Byrne v. Feeley, 61 Ga. 77; Weems v. Mackall, 4 H. & M'H. 1806 (Md.) 484; Zouch v. Parsons, 3 Burr.; Maddon v. White, 2 T. R. 159;

²Macpherson on Infancy, 354, 384.

³Hift v. McGill, 3 Barr. (Penn.)

(2) *As defendants*: The action lies against an infant wrongfully in the possession of the lands of another, and his entry and possession may be proved by his own admissions.¹ But the action can not be maintained against an infant upon the possession of his guardian.² An infant is not estopped from setting up title in himself, adverse to the plaintiff, although he has acknowledged that he held under the plaintiff, and had given his note for the price of the land.³

Ejectment to recover the lands of a minor is properly brought in the name of the guardian of the minor. *Andrews v. Townshend*, 16 N. Y. St. Rep. 876; 1 N. Y. Sup. 421 (1888).

An infant who has executed a conveyance of lands during his minority, may, on coming of age, recover the lands back in ejectment, but, before bringing the action, he must disaffirm the conveyance by some notorious act, such as an actual entry, demand of possession, or notice of his election to repudiate the deed. *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150; *Boal v. Mix*, 17 Wend. (N. Y.) 119.

§ 22. **When the Infant is a Married Woman.**—To recover possession of the lands of a married woman who is an infant, if they are not her separate property, her husband should bring the action in his name and she should be joined with him, especially if she has the fee and was ousted before her marriage, or if neither of them have had actual or constructive possession.⁴ Where they join in the action no guardian or next friend for the wife is required; the husband has authority to appoint an attorney for both, but if the land in dispute is her separate property, a guardian or next friend is necessary.⁵

§ 23. **Ejectment by Female Infant upon Attaining her Majority.**—At the common law the minority of a female infant ceases when she becomes twenty-one years of age.⁶ Under the statutes of many States it ceases at eighteen. The question is whether a female, wishing to avoid the effect of a statute of limitations fixing the time in which an action must be commenced to avoid a conveyance made by her during her minority, must bring the same within the time limited after she attains the age fixed by the common law or by the statute. In Illinois, where at the time of the passage of the statute of limitations the minority of females extended to twenty-one

¹ *McCoon v. Smith*, 3 Hill (N. Y.), 147.

² *Spitts v. Wells*, 18 Miss. 468.

³ *McCoon v. Smith*, 3 Hill (N. Y.), 147.

⁴ *Barbour on Parties*, 248; *Cook v. Rawdon*, 6 How. Pr. (N. Y.) 233.

⁵ *Cook v. Rawdon*, 6 How. Pr. (N. Y.) 233.

⁶ 1 Black. Com. 463.

years, but was afterward reduced to eighteen, it was held that it was not the mere fact that they were under twenty-one years of age that constituted a ground for excluding them from the operation of the statute; it was the fact that the law imposed upon them a certain disability called minority, and the statute having limited the minority of females to eighteen, it follows that as to them, when they attain the age of eighteen, the disability ceases and the statute of limitations begins to run.¹

§ 24. **Lunatics and Idiots.**—Ejectment can not be maintained by the committee of the person and estate of one who, upon a commission in the nature of a writ *de lunatico inquirendo*, has been found to be incapable of conducting his own affairs. It should be brought in the name of the lunatic or idiot, for the committee have no estate in his lands.²

It is a general rule that actions on behalf of a lunatic must be brought in his name, and not in that of the committee or his conservator, and there is no distinction in this respect between actions concerning his realty, and those relating to his personal estate.³

The ejectment must be brought in the name of the lunatic; for his committee is but a bailiff, and has no interest in the land. *Drury v. Fitch*, Hutt. 16; *Cocks v. Darson*, Hob. 215; *Knipe v. Palmer*, 2 Wils. 130; 43 Geo. III, c. 75.

§ 25. **Personal Representatives.**—Executors and administrators, as a general rule, do not represent the real estate of the deceased person, and, therefore, can not maintain an action to recover the possession of it. But when an executor is authorized by the will to sell the real estate of the testator, he may maintain the action for its possession, but it seems there must be a valid trust created.⁴ The executor or administrator may maintain the action for lands held by the testator for a

¹ *Kilgour v. Gockley*, 83 Ill. 111. ⁴ *Chew's Ex'rs v. Chew*, 28 Pa. St.

² *Petrie v. Shoemaker*, 24 Wend. 17; see also *Doe v. McFarland*, 9 85; *Barbour on Parties*, 259; *Knipe v. Cranch* (U. S.), 151 (1815); *Kirk v. Palmer*, 2 Wils. 130; *Burnett, etc., v. Carr*, 54 Pa. St. 285 (1867); *Carrithers Bookstaver*, 10 Hun (N. Y.), 481; *v. Bailey*, 3 Ga. 105 (1847); *Carwall Fulcher v. Griffin*, Poph. 140; *McKillip v. Killip*, 8 Barb. (N. Y.) 552; *v. Erwin*, Adm'r, 41 Ala. 292 (1867); *Brooks v. Brooks*, 3 Ired. (N. C.) 389. *Meeks v. Hahn*, 20 Calif. 621 (1862).

³ *Lane v. Schermerhorn*, 1 Hill, 97; *McKillip v. McKillip*, 8 Barb. 552; *Barbour on Parties*, 259.

term of years, for such an interest is a chattel real and goes to the personal representatives.¹

An executor who, under the will, is required to rent and let the real estate, have and receive the rents and pay them over, is entitled to recover the property by action. *McAlpine v. Daniel*, 101 N. C. 550; 8 S. E. Rep. 215 (1889).

It has been held in Indiana, that in case of the non-residence of the heirs of a mortgagee, the executor or administrator may maintain ejectment for the premises against the mortgagor, or his tenant claiming under a lease granted after the mortgage, without the privity of the mortgagee; and this without a demand of possession. *Brown v. Mace*, 7 Blackf. (Ind.) 2.

A personal representative is entitled to the possession of lands belonging to his decedent, for the purposes of administration, and may maintain ejectment to recover such possession. But he is not concerned with the title except in so far as it affects his possessory rights, and is not authorized to represent the heirs or to stand for them, when the title is in question. So where, in ejectment by an administrator, defendant files a cross-bill, claiming that the decedent held the legal title in trust for him, and praying that the trust be declared, and his title be perfected, the heirs are necessary parties. *Chowning v. Stanfield*, 40 Ark. 87; 4 S. W. Rep. 276 (1887).

Prior to the adoption of the Georgia code, it was not absolutely settled whether an administrator could recover in ejectment against an heir at law without first obtaining an order for sale from the court of ordinary. Under the code it is the better practice, if it is not indispensable to obtain such order. *Head v. Driver*, 79 Ga. 179; 3 S. E. Rep. 621 (1887).

An executor is a proper party plaintiff in ejectment, where the will contemplates his taking possession of decedent's lands in order to execute a trust, and, if there were no such testamentary disposition of the realty, he would still be the proper party for the recovery of damages sustained prior to testator's death, and any objection to his joinder is removed where the heirs are also parties. *McAlpine v. Daniel*, 101 N. C. 550; 8 S. E. Rep. 215 (1889).

Under the statutes of Florida, when administration has been granted on the estate of a decedent, and said estate is unsettled, and the administrator not discharged, the heirs at law of such decedent can not maintain a suit in ejectment for the recovery of real estate of said decedent. The administrator is the proper party plaintiff in such a case. *Doyle v. Wade*, 23 Fla. 90; 1 So. Rep. 516 (1887).

The executors of one who has granted land *in fee*, subject to an annual rent, can not maintain ejectment for the non-payment of such rent. The rule, however, is otherwise of a lease of a term for years. For this ejectment may be sustained by the executors, it being a chattel interest. Neither can a devisee of one who has granted land *in fee*, subject to rent, maintain ejectment for rent in arrear which became payable in the lifetime of the testator, but only for such as has accrued since the will took effect in his favor. *Van Rensselaer v. Hays*, 5 Den. (N. Y.) 477.

§ 26. Persons with Prior Naked Possession.—It is a general rule of law that possession is *prima facie* evidence of ownership; and as between parties who rely upon possession

¹ *Van Rensselaer v. Hayes*, 5 Denio, (N. Y.) 477 (1848).

solely, the presumption of ownership is in favor of the first possessor; so that proof of possession by a claimant, however short, will entitle him to recover unless the defendant can account for such possession, or show a prior possession or title in himself or a third person.¹

§ 27. **Receivers.**—A receiver being the creature of a court of record can not, as a general rule, institute an action for the recovery of real property without first obtaining leave of the court appointing him.² But in England it has been held that a receiver in chancery, with a general authority to lease lands from year to year, has also authority to determine such tenancies and to maintain ejectment for the recovery of the possession.³

The authority of receivers is in general statutory, and their right to be parties plaintiff to actions for the recovery of lands and tenements, depends upon the statutes under which they claim their powers.⁴

§ 28. **Reversioners—Breach of Conditions and Covenants.**—A grantor who conveys real property subject to a condition may maintain ejectment for the recovery of the premises after a breach of the condition.⁵

The grantor is a reversioner, and his interest in the property does not become a title until the recovery of the possession, for until then the title of the defendant is not divested.⁶

The right to enforce the forfeiture may be lost by waiver.⁷

It has been held in New York that a condition in a deed that the grantee should not at any time manufacture or sell, to be used as a beverage, any intoxicating liquor, or permit the same to be done on the premises conveyed was valid, and not repugnant to the grant. The right of entry upon breach of the condition being reserved in the deed, the grantor, upon proof of the breach may recover the premises in ejectment, without previous entry, demand or notice. *Plumb v. Tubbs*, 41 N. Y. 442; and to the same effect see *Gibert v. Peteler*, 38 N. Y. 165; *Cowell v. Colorado Springs Co.*, 3 Col.

¹ *Adams on Ejectment*, 137; *Doe v. Pritchard*, 5 B. & Ad. 765; *Doe v. Cook*, 7 Bing. 346.

² *Green v. Winter*, 1 Johns. Ch. (N. Y.) 60; *Sturgeon v. Douglas*, 1 Hogan, 400; *Conyers v. Crosbie*, 6 Irish Eq. R. 657; *Ward v. Swift*, 6 Hare, 312; *Wynne v. Lord Newborough*, 1 Ves. Jr. 165; 3 Bro. C. C. 88; *Angel v. Smith*, 9 Ves. 335.

³ *Green v. Winter*, 1 Johns. Ch. (N. Y.) 60; *Sturgeon v. Douglas*, 1 Hogan, 400; *Conyers v. Crosbie*, 6 Irish Eq. R. 657; *Ward v. Swift*, 6 Hare, 312; *Wynne v. Lord Newborough*, 1 Ves. Jr. 165; 3 Bro. C. C. 88; *Angel v. Smith*, 9 Ves. 335.

⁴ *Porter v. Williams*, 9 N. Y. 142.

⁵ *Ruch v. Rock Island*, 97 U. S. 693; *Bogie v. Bogie*, 41 Wis. 209; *Horner v. Chicago, etc., R. R. Co.*, 38 Wis. 165; *Bear v. Whistler*, 7 Watts (Penn.), 144; see chapter 1, §§ 26, 27.

⁶ *Guild v. Richards*, 16 Gray (Mass.), 309; *Keener v. American, etc., Co.*, 9 Bush. (Ky.) 202; *Ruch v. Rock Island*, 97 U. S. 693;

⁷ *Hooper v. Cummings*, 45 Me. 359; *Cook v. St. Paul Ch.*, 67 N. Y. 594;

Andrews v. Senter, 32 Me. 394.

82; 100 U. S. 55; *Bogie v. Bogie*, 41 Wis. 209; *Horner v. Chicago, M. & St. P. Ry. Co.*, 38 Wis. 165; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *Sperry's Lessee v. Pond*, 5 Ohio, 388; *Nicoll v. N. Y. & E. Ry.*, 12 N. Y. 121; *Warner v. Bennett*, 31 Conn. 468; *Gillis v. Bailey*, 17 N. H. 18.

But where the plaintiff sold land to a railroad company, which paid for the same, and agreed in the contract of sale that when the road was finished it would keep the land fenced, it was held that ejectment would not lie for the failure to maintain the fences as the agreement was merely an interproprietary regulation. *Hornback v. Cin., etc., R. R. Co.*, 20 Ohio St. 81.

A recovery against a tenant for life for a breach of a condition subsequent destroys a lien of a judgment on the estate of the tenant. *More v. Pitts*, 53 N. Y. 85; see *Allen v. Brown*, 5 Law (N. Y.) 280.

If an entry is made for a breach of a condition subsequent, the dower of the grantee's wife falls with the estate of her husband. *Beardslie v. Beardslie*, 5 Barb. (N. Y.) 324.

§ 29. **The Assignee of the Reversion.**—As a general rule in the American States the breach of the condition in a conveyance of real estate, for which a right of re-entry is given, can only be enforced by the grantor. The right is not assignable.¹ Nor can a stranger take advantage of it.² The right to enforce a forfeiture of this kind does not usually pass with a conveyance of the land.³ This rule of law denying to the assignee the right to enforce a forfeiture is said to be founded on the old English feudal maxims.⁴ In England and in some of the American States the rule has been changed and the right is given by statute.

§ 30. **Assignees of the Reversion—Upon a Right of Re-entry for Condition Broken—The Law of England.**—By the common law, no one could take advantage of a condition or covenant but the immediate grantor, or his heirs; a principle consistent with the old feudal maxims, but highly injurious to the rights of grantors when the practice of alienating estates became general, and leases for years a valuable possession. To remedy this evil, it was enacted by the 32 Hen. VIII, c. 34, that the grantees, or assignees of a reversion should have the same rights and advantages with respect to the forfeitures of estates,

¹ *Underhill v. S. & W. R. R. Co.*, 12 N. Y. 121; *Fonda v. Sage*, 46 Barb. 20 Barb. (N. Y.) 455; *Ruch v. Rock* (N. Y.) 109; *Underhill v. S. & W. R. Island*, 97 U. S. 693. R. Co., 20 Barb. (N. Y.) 455; *Dewey*

² *Schulenberg v. Harriman*, 21 v. Williams, 40 N. H. 222. Wall. 44; *Ruch v. Rock Island*, 97 U. S. 693; *Hooper v. Cummings*, 45 Me. ³ *Towle v. Remsen*, 70 N. Y. 303. ⁴ *Adams on Ejectment*, 121. 359; *Nicoll v. N. Y. & E. R. R. Co.*,

as the heirs of individuals, and the successors of corporations, had until that time solely enjoyed; and this statute was made most general in its operation, by particularly including the grants from the Monarch of those lands, which had then recently become the property of the Crown by the dissolution of the monasteries.¹

The words of the statute grant the privilege of re-entry to the assignees "for non-payment of rent, or for doing waste, or for other forfeiture," but these latter words have been limited in their interpretation to "other forfeiture of the same nature," and extend to the breach of such conditions only, as are incident to the reversion, or for the benefit of the estate. Thus, the assignee may take advantage of conditions for keeping houses in repair, for making of fences, scouring of ditches, preserving of woods, etc., but not of collateral conditions, as for the payment of a sum in gross, or for the delivery of corn, or wood, or such like. *Coke on Littleton*, 215, b.

A, covenanted for himself, his executors and administrators, that he would build a wall upon part of the land demised; the assignee was not bound by this covenant, because the wall was not *in esse* at the time of the demise made, but to be newly built after; but it was resolved, that if the lessee had covenanted for himself and his assigns expressly, it would have bound the assignee, although the wall was not *in esse*, inasmuch as what was covenanted to be done, was to be done on the land demised. *Spencer's case*, 5 Co. 16; *Bally v. Wells*, 3 Wils. 25.

But if the matter covenanted to be done does in no manner touch or concern the thing demised, as to build a wall on other land, or pay a collateral sum to the lessor, the assignee, though named, will not be bound. *Vernon v. Smith*, 5 B. & A. 1.

A covenant in a lease of land, that the lessee or his assigns will not hire persons to work on the demised premises who are settled in other parishes, is a collateral covenant, and does not bind the assignee, although expressly named; for it does in no way affect the thing demised, although it may collaterally affect the lessor by increasing the poor rates upon him. *The Mayor v. Pattison*, 10 East, 130.

A covenant to supply the demised premises with good water during the term runs with the land, for it is a covenant which respects the premises demised, and the manner of enjoyment. *Jourdan v. Wilson*, 4 B. & A. 266.

A being seized of a mill, and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises; this reservation of the suit to the mill is in the nature of a rent, and the implied covenant to render it, resulting from the *reddendum*, is a covenant that runs with the land, so long as the ownership of the mill and the demised premises belong to the same person. *Vivyan v. Arthur*, 1 B. & C. 410.

The assignee of part of the reversion in all the lands demised, is an assignee within this statute, but the assignee of the reversion in part of the

¹ *Adams on Ejectment*, 121.

lands is not: for the condition being entire, can not be apportioned by the act of the parties, but shall be destroyed. If, therefore, A be lessee for years of three acres, with condition of re-entry, and the reversion of all the three acres be granted to B, for life, or for years, B can take advantage of the breach of the condition; but if a reversion of any nature whatsoever, even in fee, of two acres only be granted to B, he can not. Coke on Littleton, 215 (a).

A condition that a lessee shall not assign over his term, without license from the lessor, is a collateral condition; and can not be taken advantage of by the assignee of the lessor. *Lucas v. How*, Sir T. Raym. 250; *Collins v. Silley*, Stiles, 265; *Pennant's case*, 3 Co. 64.

A *cestui que use*, and bargainee of the reversion, are within this statute, because they are assignees by act of the party; but it does not extend to persons coming in by act of the law, as the lord by escheat; nor to an assignee by estoppel only. Coke on Littleton, 215 a; *Andu v. Nokcs*, Moore, 419.

A covenant in a deed of land not to erect a building on a common or public square, owned by the grantor in front of the premises conveyed, is a covenant running with the land, and passes to a subsequent grantee of the premises, without any special assignment of the covenant. *Trustees v. Cowan*, 4 Paige (N. Y.), 510.

Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to separate individuals, the covenant will attach on each parcel *pro tanto*. And the assignee of each part will be answerable for his proportion of any charge upon the land, which was a common burden upon the whole, and will be exclusively liable for the breach of any covenant which related to that part alone. *Astor v. Miller*, 2 Paige (N. Y.), 68; 1 Am. Ch. Dig. 440.

§ 31. **Tenant For Years—For Life—In Tail—Or in Fee.**—It has been said by a learned writer,¹ that a tenant for years can not, before entry, maintain an action of trespass or ejectment, because those acts complain of a violation of the possession, and therefore can not be maintained by any person who has not had an actual possession; but this reasoning does not seem applicable to the modern principles of the remedy by ejectment.²

Tenant for Years.

An action of ejectment, although in form a fiction, is in substance a remedy pointed out to him who has a right to land, of which he is wrongfully deprived; it is the title of the lessor, and not of the nominal lessee, that is to be decided. *Carroll v. Norwood's Heirs*, 5 Harr. & J. 173.

Lessor, lessee, under-lessee: in a lease from lessee to under-lessee, it was provided, that if under-lessee were guilty of a breach of covenant, lessee and lessor might enter.

Held, that on a breach of covenant in the lease to under-lessee, ejectment might be maintained by lessee alone. *Doe v. White*, 4 Bing. 276.

¹ Cruise, Dig., 248; see 4 Bac. Abr. 163.

² 1 Cru. Dig., 248; *et vide* 4 Bac. Abr. 183; *Goodright v. Cator*, Doug. 477.

Tenant in Tail.

The widow of an intestate can not join with the heirs in bringing ejectment for the lands of the deceased. *Pringle v. Gaw*, 5 Serg. & R. (Penn.) 536.

In the State of New York, in an action under the code, to recover real property corresponding to the former action of ejectment, when the wife is the owner of the fee and the husband tenant by the curtesy initiate, the husband and wife may join in the action. *Ingraham v. Baldwin*, 12 Barb. (N. Y.) 9; *Doe v. Webb*, 18 Ala. 810.

Husband and wife take by deed, the husband may, it seems, give a lease in his *own name* for the purpose of bringing ejectment. *Jackson v. McConnell*, 19 Wend. (N. Y.) 175.

It is not necessary that wife should join with husband in ejectment for recovery of land conveyed to husband and wife. *Jackson v. Leslie*, 19 Wend. (N. Y.) 339.

A married woman may dis seize another without the assent of her husband; but when a husband is in possession of land, in right of his wife, a writ of entry must be brought against both. *Little v. Gardener*, 5 N. H. 415; see *Moore v. Pearce*, 2 Har. & M'H. (Md.) 236; *Den v. Stockton*, 7 Halst. (N. J.) 322; *Ely v. McGuire*, 2 Ham. (Ohio) 223.

In ejectment by mortgagee against mortgagor, it is not necessary to demand possession before action brought. Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most, tenant by sufferance only; and may be treated either as tenant or trespasser at the election of the mortgagee. *Doe v. Maisey*, 8 Barn. & C. 767.

§ 32. **Tenants as Plaintiffs—Lessors Defendant.**—A tenant for years may recover the possession of the demised premises in an action of ejectment.¹ But a tenant at sufferance who has been dispossessed by his landlord without a demand for possession, can not maintain the action for the recovery of the possession from which he has been ousted, because he has no interest in the land. His remedy is in trespass.²

A tenancy by sufferance, existing only by the laches of the owner, can not give the occupant an estate or interest capable of transmission to another. *Reckhow v. Schanck*, 43 N. Y. 448.

It appears to have been held in Indiana that a tenant at will may maintain the action against his lessor for the recovery of the possession of his estate,³ but the decision seems to be against the weight of authority on this question. The definition of the term itself precludes the idea of a tenant at will sustaining the action against his lessor, for the reason that

¹*Olendorf v. Cook*, 1 Lans. (N. Y.) (1818); see also *Stone v. Grubham*, 1 37 (1869). Rolle, 3; *Runnington on Ejectment*, 23.

²*Doe v. Murrell*, 8 C. & P. 134.

³*Buntin v. Doe*, 1 Blackf. (Ind.) 27

any act of the lessor amounting to an ouster of the tenant would indicate in the strongest manner the withdrawal of his assent and constitute a determination of the tenancy.

The grantee of a tenant at will in this respect is in no better position than the tenant. The tenant has no certain and indefeasible estate, nothing that he can grant to a third person, and, therefore, his grantee can not maintain the action.

The Indiana opinion seems to be based upon the case of *Stone v. Grubbam*, cited by Runnington on Ejectment. But this case sustains the tenant's right to the action against an intruder, on the theory that ejectment is in its nature an action of trespass supposed to have been committed *vi et armis*, the wrong committed being personal to the party in actual possession, and therefore the tenant at will may make a lease to punish the trespass and ejectment, otherwise there would be an injury done and no one competent to redress it. *Stone v. Grubbam*, 1 Rolle, 3; Runnington on Ejectment, 23.

Runnington says: "By the modern practice, the defendant is obliged by rule of court, to confess lease, entry and ouster, yet that rule was only designed to expedite the trial of the plaintiff's right, and not to give him a right which he had not before. Hence, it must appear that the plaintiff had actually the possession, and was ousted thereof by the defendant; for the ejectment is an action of trespass in its nature, and is said to have been committed *vi et armis*; it must, therefore, be done to the person himself complaining, and not to another who had the plaintiff's possession, though his title may be affected by the ouster. For it would be absurd to state that the defendant, *vi et armis*, ejected the plaintiff, when it appears, by his own showing, that he had not the actual possession, but that it was, at the time of the ouster, in another. Therefore, if A, lessee for years, make a lease to B at will, and B is ejected, A can not sustain this action upon that ouster, because, though the possession of B was in law the possession of A, yet the trespass, *vi et armis*, which is complained of, must be against the actual possession, which was in B. But it seems in this case that B (though only tenant at will) may make a lease to punish the trespass and ejectment; otherwise there would be an injury done, and no one competent to redress it." Runnington on Ejectment, 23.

Where the obligee of a bond to make titles took possession, under a parol agreement, to the effect that he might occupy the premises until the bond matured, it was held he was a mere tenant at will of the obligor, and not entitled to maintain ejectment against the latter, or one taking title from him. *Richardson v. Thornton*, 7 Jones (N. C.), L. 458; *Love v. Edmonston*, 1 Ired. (N. C.) Law, 152.

§ 33. **A Tenant by Curtesy.**—As a general rule, a husband, who is a tenant by the curtesy, of his wife's lands, may maintain an action for the recovery of the lands in his own name,¹

¹*Tucker v. Vance*, 2 A. K. Marsh. Black (U. S.), 150; *Jackson v. Leek*, (Ky.) 458; *Wilson v. Arentz*, 70 N. C. 19 Wend. (N. Y.) 339; *Prescott v. 670; Chambers v. Handley*, 3 J. J. Jones, 29 Ga. 58; *Thompson's Lessee Mar. (Ky.) 98; Gregg v. Tesson*, 1 v. Green, 4 Ohio St. 216.

but it is held in some States, that his wife must join in the action.¹

§ 34. **Tenants in Common—Joint Tenants and Coparceners.**—It is a maxim of the common law, that the possession of one tenant in common, joint tenant or coparcener, is also the possession of his companion in estate,² and it therefore follows, that the possession of one such tenant or coparcener, can never be considered under the common law as adverse to the title of his companions, unless it is attended by circumstances of an adverse character and interest; or, in other words, whenever a tenant in common, joint tenant or coparcener is in possession, his companion is, in contemplation of the common law, in possession also, and it is necessary, in order to enable his companion to maintain ejectment, to rebut this presumption by proof of an actual ouster.³

§ 35. **Tenants in Common—Extent of Recovery.**—A tenant in common with others, either by himself or with all his co-tenants, may bring and maintain an action against a trespasser upon his real estate for the possession of so much thereof as he may show himself entitled to; and upon the establishment of his claims to the property, he may have judgment for so much only as he can show his interest to be.⁴

§ 36. **Tenant by Elegit—Obsolete in America.**—It is laid down in the case of *Lowth v. Tomkins*,⁵ that if a tenant by *elegit* desire to obtain *actual* possession of the lands, he must bring an ejectment, for the sheriff, under the writ, delivers only the legal possession; which doctrine is recognized by Lord Kenyon, C. J., in the case of *Taylor v. Cole*;⁶ but in the case of *Rodgers v. Pitcher*,⁷ it is said by Gibbs, C. J.: "I am aware that it has in several places been said, that the tenant in *elegit* can not obtain possession without an ejectment, but I have always been of a different opinion. There is

¹ *Carter v. Roland*, 53 Tex. 540.

² *Barnitz v. Casey*, 7 Cranch (U. S.), 456 (1813); *Avery v. Hall*, 50 Vt. 11 (1871); *Vance v. Schroyer*, 77 Ind. 501 (1881); *Hammond v. Morrison's Lessee*, 33 Md. 95 (1870); *Adams on Ejectment*, 135.

³ *Ford v. Gray*, Salk. 285; *Smales v. Dale*, Hob. 120; *Doe v. Keen*, 7 T. R. 386.

⁴ *Matlis v. Boggs*, 19 Neb. 698; 28 N. W. Rep. 325 (1886); *Cruger v. Mc-Laury*, 41 N. Y. 219; *Dewey v. Brown*, 2 Pick. (Mass.) 387; *Gray v. Givens*, 26 Mo. 291; *Dawson v. Mills*, 32 Pa. St. 302; see chapter VI, *Cotenants and Tenants in Common*.

⁵ 2 Eq. Ca. Ab. 380.

⁶ 3 T. R. 295.

⁷ 6 Taunt. 202.

no case in which a party may maintain an ejectment in which he can not enter. The ejectment supposes that he has entered; and that the lessor may do it by another, and not enter himself, is not very intelligible. I would not, however, consider the present case as now deciding these points, which I only throw out in answer to the argument that has been used."

When a tenant in possession claimed under a lease granted prior to the date of the judgment against his lessor, it was held that the tenant by *elegit* could not recover in ejectment; because the lessee's title being prior in point of time, the legal estate was in him;¹ but where the possession of the tenant was subsequent to the date of the judgment, although prior by two years to the issuing of the writ of *elegit* and inquisition thereon, the title of the tenant by *elegit* was not barred;² if, however, the tenant does not himself claim this protection, but suffers judgment by default, it will not avail the judgment debtor, though he may appear as landlord and defend the action.³

By the common law, a man could only have satisfaction of goods, chattels and the present profits of lands, by the writs of *feri facias* or *levari facias*; but not the possession of the lands themselves. The statute therefore granted the writ of *elegit* (called an *elegit* because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former), by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff at such reasonable appraisement and price in part satisfaction of his debt. If the goods are not sufficient, then the moiety or one half of his freehold lands which he had at the time of the judgment given, whether held in his own name, or by another in trust for him, are also to be delivered to the plaintiff, to hold until, out of the rents and profits thereof, the debt be levied, or until the defendant's interest be expired. During this period, *the plaintiff is called tenant by elegit*. 3 Blk. Com., 418, 419.

The *fi. fa.* is now the uniform process to sell lands, and the *elegit* is abandoned. 4 Kent's Com., 436, note.

To recover in ejectment under a purchase at a sheriff's sale, on a judgment against a party not in possession, the plaintiff must prove against the one found in possession, that the party against whom the judgment was rendered, had some right, title or interest in the premises sold. And it was held not enough to show that such party held adversely for less than twenty years, but abandoned the premises before judgment, to which she never returned, though a few months after abandoning she conveyed to the defendant in the ejectment, who afterward entered under the conveyance. *Jackson v. Town*, 4 Cow. (N. Y.) 599.

¹ Doe v. Wharton, 8 T. R. 2.

² Adams on Ejectment, 117; Doe v.

³ Doe v. Hilder, 2 B. & A. 782.

Creed, 2 M. & P. 648.

§ 37. **Trustees and Cestuis Que Trust.**—A trustee may recover lands in ejectment against his *cestui que trust*,¹ unless, as under certain circumstances, a conveyance of the legal title is presumed.² And a *cestui que trust*, entitled to the possession of land, may maintain the action against his trustee.³ Where a *cestui que trust* is entitled, as such, to the possession of land, and is ousted from it by a stranger, he may maintain ejectment for its recovery,⁴ notwithstanding the legal estate is still in the trustee.⁵ But this does not deprive the trustee, holding the legal title, of his right to maintain the action himself.⁶ He may bring ejectment, and a wrong-doer can not set up the title of the *cestui que trust*.⁷ The action may also be maintained by the heirs at law of the surviving trustee, the suit not being adverse to the *cestui que trust*.⁸ As against an intruder, or one showing no title, it is a matter of no importance whether the legal title of the land is absolutely in the holder or whether he holds it in trust for another.⁹

The rule is well settled that a trustee may recover in ejectment the lands affected by the trust even as against the *cestui que trust*. A court of law may indeed investigate some questions of fraud, and when proved treat a deed as a nullity and conveying no title, but in general it will not go behind the naked legal title and inquire where the equities are. Even in a case of naked trustee, the law is so strenuous for the legal title that it enables the trustee to recover in ejectment against the *cestui que trust*. *Kirkpatrick v. Clark*, 132 Ill. 342 (1890); 24 N. E. Rep. 71.

§ 38. **The Trustee Holds the Legal Estate.**—The title of the *cestui que trust* is merely an equitable title, and the trustee being vested with the legal estate, remedies in the nature of ejectment must, of course, be brought in his name.¹⁰

¹ *Matthews v. Ward*, 10 Gill & J. (Md.) 443; *Barbour on Parties*, 263; 38.

Beach v. Beach, 14 Vt. 28; *Reade v. Reade*, 8 T. R. 118; *Starke's Lessee v. Smith*, 5 Ohio, 455; *Stearns v. Palmer*, 10 Met. (Mass.) 35; *Den v. Bordine*, 1

Spencer (N. J.), 394; *Nicoll v. Walworth*, 4 Den. (N. Y.) 385.

² *Beach v. Beach*, 14 Vt. 28.

³ *Presbyterian Cong. v. Johnston*, 1 *Watts & S.* (Penn.) 9.

⁴ *School Directors v. Dunkleberger*, 6 *Barr.* (Penn.) 29; *Kennedy v. Fury*, 1 *Dall.* (U. S.) 72; *Presbyterian Cong. v. Johnston*, 1 *Watts & S.* (Penn.) 9.

⁵ *Hopkins v. Ward*, 6 *Mun.* (Va.)

⁶ *Hopkins v. Stephens*, 2 *Rand.* (Va.) 422.

⁷ *Hunt v. Crawford*, 3 *Pa. St.* 426.

⁸ *Crunkleton v. Evert*, 3 *Yeates* (Penn.), 570.

⁹ *Lair v. Hunniker*, 28 *Pa. St.* 115.

¹⁰ *Adams on Ejectment*, 127;

Stearns v. Palmer, 10 *Met.* (Mass.) 35;

Wake v. Tinkler, 16 *East*, 36; *Good-*

title v. Jones, 7 *T. R.* 47; *Methodist*

Soc. v. Bennett, 39 *Conn.* 293; *Mc-*

Clurg v. Wilson, 43 *Penn. St.* 439;

Baker v. Nall, 59 *Mo.* 265; *Kirkland*

In California a trustee, holding the legal title to real estate, is the real party in interest, so far as the defendant is concerned, so as to enable him to maintain an action to recover such real estate. *Anson v. Townsend*, 73 Cal. 415; 15 Pac. Rep. 49 (1887).

When it appeared that the plaintiff in an ejectment was appointed trustee under a marriage settlement, and vested with the title for the use of a wife, with power of disposition in her by will, and in the event of her intestacy, then the property was to go to her children. Pending the action the wife died. It was held that the trustee could continue the action so as to enable him to execute the trust, by recovering the possession and turning it over to those entitled to it, and to accomplish this end he was allowed to add such demises as might be necessary to bring in the children as formal parties. *Findlay v. Athorpe*, 48 Ga. 537.

Where the defendant deeded to the plaintiff as trustee, "to seize, sell, and dispose of" the real estate in dispute, and apply the proceeds to the payment of certain debts, it was held that sufficient title passed to the trustee to support ejectment to recover the lands, to enable him to carry into effect the objects of the trust. *Cameron v. Phillips*, 60 Ga. 434.

§ 39. **Trustees and the Statute of Uses.**—In all cases in which the trusts are not executed by the statute of uses, the legal estate vests in the trustees, and of course, in such cases, they may maintain ejectment.¹

A distinction has been made between a devise to a person in trust to pay over the rents and profits to another,² and a devise in trust to permit some other person to receive the rents and profits; the legal estate, in the first case, being held to be vested in the trustee, and in the latter, in the *cestui que trust*. In speaking of this distinction, Sir James Mansfield said: "It seems miraculous how such a distinction became established; for good sense requires that in both cases it should be equally a trust, and that the estate should be executed in the trustee; for how can a man be said to permit and suffer, who has no estate and no power to hinder the *cestui que trust* from receiving?"³ And in this connection it is stated in *Adams on Ejectment*:

v. Cox, 94 Ill. 400; *Trustees M. E. Church v. Stewart*, 27 Barb. (N. Y.) 553; *Western R. R. Co. v. Nolan*, 48 N. Y. 517; *Moore v. Burnet's Lessee*, 11 Ohio, 334; *Beach v. Beach*, 14 Vt. 28; *Cox v. Walker*, 26 Me. 504; *Hopkins v. Stephens*, 2 Rand. (Va.) 422; *First Baptist Soc. v. Hazen*, 100 Mass. 322; *Matthews v. Ward*, 10 G. & J. (Md.) 443; *Fitzpatrick v. Fitzgerald*, 18 Gray (Mass.), 400; *Chapin v. First Universalist Soc.*, 8 Gray (Mass.), 581; *Doggett v. Hart*, 5 Fla. 215.

¹ *Adams on Ejectment*, 127.

² *Shep. Touch.* 482; 1 Eq. Cas. Ab. 383, 384; *Shapland v. Smith, Brown*, Chan. Cas. 75; *Silvester v. Wilson*, 2 T. R. 444; *Jones v. Ld. Say and Sele*, 8 Vin. Ab. 262; *Broughton v. Langley*, Salk. 679; 1 Lut. 814; *Burchett v. Durdant*, 2 Vent. 311; *Tenny v. Moody*, 3 Bing. 3.

³ *Doe v. Biggs*, 2 Taunt. 109, 113.

"It has, indeed, in several cases, been argued, that a devise to trustees to receive the rents and profits, and pay them over, will not vest the legal estate in the trustees, unless something is required of the trustees which renders it necessary that they should have an interest in the lands, as to pay rates and taxes, etc.; but this doctrine has not yet been sanctioned by any decisions of the courts; though certainly it has happened in all the latter cases, that the trustees have been required to do other acts, as well as to pay the rents and profits."¹ It is believed that this distinction is not recognized in the American States.

In cases where it is necessary for the purpose of the trust that the trustees should take the legal estate, it will be held to vest in them, though the devise be that they suffer and permit the *cestui que trust* to receive the rents and profits; as where the trust was *feme covert* to receive the rents and profits during her natural life, for her sole and separate use, they were held to have the legal estate; such construction being necessary to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the *feme covert*. *Harton v. Harton*, 7 T. R. 652.

And where lands were conveyed to the trustees in trust, with the consent of A, to sell the inheritance, with a proviso that the rents, until such sale, should be received by such person, and for such uses as they would have been if the deed had not been made, it was held that the estate was executed in the trustees, and that it was not a mere power of sale annexed to the legal estate of the owner. *Keene v. Deardon*, 8 East, 248. So also of a devise on trusts to convey. *Doe v. Field*, 2 B. & Ad. 564; *Doe v. Edlin*, 4 A. & E. 582.

Where the devise was to A in trust, to permit and suffer the testator's widow to have, hold, use, occupy, possess, and enjoy the full, free and uninterrupted possession and use of all interest of moneys in the funds, and rents and profits arising from the testator's houses for her natural life, if she should remain unmarried, and that her receipts for all rents, etc., with the approbation of any of the trustees, should be good and valid, she providing for and educating properly the testator's children, and also paying certain annuities, and in case the widow should marry again, then upon certain other trusts, it was held that the use was executed in the devisees in trust, and upon this ground, that the testator, having made the approbation of the trustees necessary to the widow's receipts, showing that he did not intend to give her a legal estate. *Gregory v. Henderson*, 4 Taunt. 772.

Gibbs, J., said; "The rule has been misconceived. Though an estate be devised to A and his heirs, to the use of B and his heirs, the courts will not hold it to be an use executed, unless it appears by the whole will

¹ Adams on Ejectment, 127; Jones P. 175; *Doe v. Ironmonger*, 3 East, v. Ld. Say and Sele, 3 Vin. Ab. 262; 533; *Doe v. Scott*, 4 Bing. 505; *White Kenrick v. Lord Beaucherk*, 3 B. & v. Parker, 1 B. N. C. 573.

to be the testator's intent that it should be executed. The courts will rather say the use is not executed, because the approbation of the trustee is made necessary, than that the approbation of a trustee is not necessary because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the trustees. 'I leave my wife to receive the rents, provided there is always the control of one of the trustees upon her receipts.' The testator, therefore, certainly meant that some control should be exercised, and what could that control be, except they were to exercise it in the character of trustees?" *Gregory v. Henderson*, 4 Taunt. 772.

Where certain freehold and leasehold premises were devised to trustees, "to permit and suffer the testator's wife to receive and take the rents and profits," and other lands were devised to the same trustees, upon trusts clearly not executed by the statute, and immediately after the last of the different devises a proviso followed, "that it should be lawful for the trustees, at any time, till all the said lands, etc., devised to them, should actually become vested in any other person or persons, by virtue of the will, or until the same, or any part thereof, should be absolutely sold, as aforesaid, to lease the same, or any part thereof," it was held that the legal estate in the freehold lands contained in the first devise, vested in the widow, notwithstanding that leasehold premises were contained in the same devise (the legal interest in which, of course, vested in the trustees), and the subsequent leasing power given by the will, "the trustees having no control over the lands in the first devise for any purposes of the testator's will." *Right v. Smith*, 12 East, 455.

Where the devise was, that the trustee should pay unto, or else permit and suffer, the testator's niece to receive the rents, the legal estate was held to be in the niece, because the words "to permit and suffer" came last; and in a will, the last words prevail, though in a deed the first. *Doe v. Biggs*, 2 Taunt. 109.

In a case where the devise was, "I give and bequeath my real estates, lands, etc., and also my personal estate, etc., to A B, upon trust, to the intent that the said A B, his heirs, etc., shall first dispose of my personal estate, or so much thereof as shall be sufficient for that purpose, in payment of my debts, etc., and as to all my real estates, wheresoever and whatsoever, subject to my debts, and such charge or charges as I may now, or at any time or times hereafter, think proper to make, I give, devise and bequeath the same to C D, for the term of his natural life, with remainder to E F, etc.," it was holden that the legal estate was vested in C D because an intention that the trustees should pay the debts was not apparent on the face of the will, and therefore there was no reason for giving the legal estate to the trustees. *Kenrick v. Beauchlerk*, 3 B. & P. 175.

§ 40. **Widows.**—Under the ancient English law when there was a custom in a manor, that the widow should enjoy, during her widowhood, the whole, or part, of the customary lands, wherewith her husband died seized, as of free-bench, she might, after challenging her right, and praying to be admitted, maintain an ejectment for them, without admittance, even against

the lord; because, it was an excrescence which, by the custom and the law, grew out of the estate.¹

But, if the widow's claim be in the nature of dower, an ejectment will not lie before an assignment² thereof by proceedings in some court of competent jurisdiction.

§ 41. **Defendants in Ejectment.**—The modern rule in ejectment requires that all persons who have or claim to have any interest, ownership, title or right of possession in or to the premises sought to be recovered, must be joined as defendants if it is sought to bind them upon questions of title. The judgment will not be binding upon persons as to the title unless they are made parties to the suit, but if the question is one of possession only, then the parties in possession, actual or constructive, are the proper parties to be made defendants.³ This matter is, however, regulated in most of the States by legislative enactments.

How. St. Mich. § 7791, requires the actual occupant to be made defendant in ejectment proceedings. In an action against a wife her husband testified that he occupied the premises with her. Held, that there was a joint occupancy of the premises, requiring both to be made parties defendant. *Haddy v. Tobias*, (Mich.) 48 N. W. Rep. 499 (1891); Am. Dig., 1392.

A sheriff's return to a rule to show cause why he should not execute a writ of *habere facias* showed that the premises were occupied by one H., not a party to the action, under a claim of title paramount. This also appeared by H.'s return to the rule, and also that he was in possession under such claim of title when the action was brought; but the court made the rule absolute, and directed the sheriff to proceed to execute the writ against H. Held, error. H. could not be ejected without a day in court. *Hessel v. Fritz*, 124 Pa. St. 229; 16 Atl. Rep. 853; 23 W. N. C. 299 (1889).

A wife living with her husband on land, and claiming the land as her separate estate, under a right derived from a person other than her husband prior to the commencement of the action, can not be turned out of possession by a writ of possession in an action of ejectment against her husband to which she was not a party. In such case she is, as to her claim, a person distinct from her husband, and must be made a party to the action, like any

¹ Adams on Ejectment, 112; Good- *Chapman v. Sharpe*, 2 Show. 184. In win v. Longhurst, Cro. Eliz. 535; Doe v. New Hampshire ejectment will lie v. Bellamy, 3 M. & S. 87. for dower in a limited time after

² *Bralton v. Mitchell*, 7 Watts demand for an assignment. *Robie v. (Penn.)* 113, (1838); *Pringle v. Gaw, Flanders*, 33 N. H. 534 (1856); see 5 Serg. & R. (Penn.) 536 (1820); chapter 11, "Where the action is the Adams on Ejectment, 112; Doe v. proper remedy," § 15.

Mitt, 2 Carr. & P. 430; *Juridan v. Walsh v. Vartney*, 38 Mich. 73; *Stone, Hutt*. 18; *Howard v. Bartlett*, *Lyttle v. Burgin*, 82 N. C. 301; *Moore Hob*. 181; *Doe v. Nutt*, 2 C. & P. 430; *v. Deyo*, 22 Hun (N. Y.), 208.

other person, in order to bind her by the judgment. *Bushong v. Rector*, 32 W. Va. 311; 9 S. E. Rep. 225 (1889).

In an action of ejectment, plaintiff can not bring in parties who assert no claim against him, so that they, by filing cross-petitions, may in the same suit recover from defendant land outside of the line claimed by plaintiff. *Long v. Louisville & N. R. Co. (Ky.)*, 14 S. W. Rep. 78 (1890).

In an action for the possession of land, and for an accounting, where defendant at the time of its purchase had notice of plaintiff's claim, defendant, not being liable for profits accruing prior to the conveyance to it, unless by reason of some contract to that effect, can not demand that its grantors be made parties defendant. *Swift v. State Lumber Co.*, 71 Wis. 476; 37 N. W. Rep. 441 (1888).

§ 42. Occupant—Person in Possession—A Question of Fact for the Jury.—The question as to who is the actual occupant or person in the real possession of the premises in dispute at the commencement of the action or at any other material time, and so a proper defendant, is a question of fact for the determination of the jury.¹

§ 43. Possession by Servants and Employees.—It is a well settled rule of law that when premises for which an action of ejectment is to be brought, are actually occupied and possessed, though by a mere servant, who claims no beneficial interest in them and labors wholly for his employer, the action must be brought against such servant and not against his principal.² But where a party, not in the actual occupation of premises as distinguished from the exercise of acts of ownership, is found in the cultivation of and working upon such premises, or as a servant or employe of a person claiming adversely, and is sued, in ejectment, it is competent for him to show his true relation to his principal or employer. Such a party is not an occupant of the land within the meaning of the ejectment law and the action can not be maintained against him.³ Questions frequently arise as to the true character of the defendant's occupancy of the premises. And the question as to whether the defendant is in the situation of mere servant, a tenant or otherwise, is one of fact proper to be determined by the jury from all the evidence in the case.⁴

¹*Martin v. Rector*, 28 Hun (N. Y.), 409; 101 N. Y. 77; 4 N. E. Rep. 183. ²*Chiniquy v. Catholic Bishop*, 41 Ill. 148 (1866); *Strarer v. McGraw*,

³*Strarer v. McGraw*, 12 Wend. (N. Y.) 558 (1824); *Doe v. Y.* 558 (1824); *Doe v. Steadling*, 2 Stanton, 2 B. & Ald. 371.

Stark. 148; 3 Com. L. R. 307.

⁴*Doe v. Stanton*, 2 B. & Ald. 371.

Application of the rule—Ministers and school teachers of a religious corporation not liable in ejectment: The Catholic Bishop of Chicago brought a suit in ejectment against Charles Chiniquy, Gustave Demars and others, for the recovery of a church at Kankakee; on the trial it appeared in evidence that Chiniquy and Demars occupied the property only as a minister and school teacher in the employ of the society under its direction, and had no other or further possession or control of the premises. That the society had the actual possession of the property. The defendants requested the court to charge upon this evidence that the action could not be sustained against them. Mr. Justice Breese of the Supreme Court, in reversing the judgment for the refusal to give this instruction, said that the instruction is drawn on the hypothesis that Chiniquy and Demars were merely servants or employes performing their daily or weekly tasks upon the premises, and not the occupants in the sense of the ejectment law. It puts a case which would no more render Chiniquy and Demars liable to an action of ejectment than would be the cashier and teller of a bank if a suit was brought against the banking corporation to recover possession of the banking house. It surely can not be said that a clergyman who preaches in a church in the employment of a religious corporation is liable to an action of ejectment. As well might the claimant of a farm bring his action against the men employed to cultivate it by the occupant in adverse possession. *Chiniquy v. Catholic Bishop*, 41 Ill. 148.

In New York, where premises are actually occupied and possessed by a mere servant, who claims no beneficial interest in them, it was held that the action must be brought against such servant and not against his principal. *Shaver v. McGraw*, 12 Wend. (N. Y.) 692.

§ 44. **Joinder of Defendants.**—The practice of uniting several defendants in ejectment in one suit where the plaintiff's title in relation to all is the same, although their possession may be several and not joint, has been sanctioned by authority both in this country and England.¹ If we consider the action in its original character as an action of trespass strictly, there would seem to be no doubt but that the plaintiff can so join several defendants.² The general rule in actions for torts against several who join in a plea is, that the jury may find some guilty of part and others guilty of another part, and some not guilty, and may assess several damages.³ Under this rule the plaintiff in ejectment would undoubtedly be entitled to judgment against the defendants severally, according to the verdict, and where they do not join in the plea, the same rule

¹ *Jackson v. Woods*, 5 Johns. (N. Y.) 278; *Jackson v. Andrews*, 7 Wend. (N. Y.) 152; *Jackson v. Scoville*, 5

² *Jackson v. Woods*, 5 Johns. (N. Y.) 278. ³ *Player v. Warn*, Cro. Car. 54; Wend. (N. Y.) 96; *Decrow v. Jenkins*, Tidd's Practice, 805; *Jackson v. Cro. Car. 178*; *Grimstone v. Burgess*, Woods, 5 Johns. (N. Y.) 278; *Jack-Barnes*, 176; *Smith v. Crabb*, 2 Stra. son v. Andrews, 7 Wend. (N. Y.) 152. 1149.

may well apply as in trespass, of finding some of the defendants guilty and some not guilty; in which case the judgment must follow the verdict.¹

Ejectment can not be maintained against a landlord not in possession, without joining, as defendant, the tenant who is in possession. *Shaw v. Tracy*, 95 Mo. 531; 8 S. W. Rep. 434 (1888).

Persons not in actual possession of land should not be joined in ejectment with a defendant who is in actual possession, claiming adversely to them as well as to plaintiffs. *Grundy v. Hadfield*, 16 R. I. 579; 18 Atl. Rep. 186 (1889).

Though the executor, by reason of a trust imposed on him by the will, is the proper plaintiff in ejectment for decedent's lands, the joinder of the heirs is harmless to either plaintiff or defendant. *McAlpine v. Daniel*, 101 N. C. 550; 8 S. E. Rep. 215 (1889).

Ejectment can not be maintained against the landlord alone, if he has constructive possession as landlord, there being no statute authorizing such an action in Rhode Island. *Grundy v. Hadfield*, 16 R. I. 579; 18 Atl. Rep. 186 (1889).

Plaintiffs brought suit in ejectment against defendant, who claimed the lands under a tax deed to his grantor. Defendant was not in the actual possession of the lands, and the evidence to show that the grantor was in possession was vague and unsatisfactory. *Rev. St. Wis.*, §§ 3075, 3076, provides: "If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named in the complaint; if they are not so occupied, the action must be brought against some person exercising some acts of ownership on the premises claimed or claiming title thereto or some interest therein, at the commencement of the action." *Held*, that defendant was properly sued alone. *Burchard v. Roberts*, 70 Wis. 111; 35 N. W. Rep. 286 (1887).

In ejectment for land of which the several defendants had taken possession, each claiming a certain portion, where some of the defendants enter a disclaimer, and others, with plaintiff's consent, agree to a judgment against them without costs or damages, the remaining defendants, who only plead the general issue are, on a general verdict against them, liable for all the costs and damages. *Bell v. Foxen*, 14 Sawy. (U. S.) 499; 42 Fed. Rep. 755 (1891).

In an action of ejectment to recover the possession of real estate, all occupants of the premises must be made defendants, to be concluded by the judgment, unless some of such occupants are so in privity with one or more co-defendants that a judgment against such co-defendant will be conclusive upon them. *Tarkington v. Link*, 27 Neb. 826; 44 N. W. Rep. 35 (1890).

After the equity of redemption of mortgaged lands had been sold to a married man, the lands were sold under the mortgage to plaintiff. *Held*, that the wife of said married man, making no claim to the land in her own right, was improperly joined as defendant with her husband in an action for the land. *Johnson v. Donaldson* (R. I.) 20 Atl. Rep. 932; *Am. Dig.* 1891, 1391,

Where defendant in ejectment admits that he is in possession of the

¹ *Jackson v. Andrews*, 7 Wend. (N. Y.) 152.

land when it is demanded of him, the tenant from month to month by whom he holds possession is not a necessary party defendant. *City of Napa v. Howland*, 87 Cal. 84; 25 Pac. Rep. 247 (1891).

Land belonging to G. was leased by his widow, as administratrix, to defendant. *Held*, in ejectment to recover the land after expiration of the term, that the widow was improperly joined as plaintiff with the heirs at law of G., it appearing that her only interest was a right of dower. *Gorton v. Potter*, 16 R. I. 493; 17 Atl. Rep. 909 (1889).

§ 45. **Alienation by Defendant Pending Suit.**—A conveyance by a defendant in an action of ejectment of the premises in question, pending the suit, has been held to be void, though the purchaser pay a full consideration.¹ The rule is supposed to rest upon the presumption that every person is attentive to what passes in the courts of his State and is founded upon public policy as to the alienation of property.² But the better rule would seem to be that the conveyance is only so far a nullity that it can not avail the party against the title finally established by the suit.³ The voluntary alienation of the premises in question, pending an ejectment suit by the defendant, is not permitted to affect the rights of other parties to the suit, and all persons so purchasing are treated in law as purchasers with notice, and subject, not only to the title established by the suit, but all the equities of the persons under whom he claims in priority.⁴

§ 46. **Parties to Actions—Statutory Provisions.**—The statutory provisions of the various States in regard to parties litigant are for the most part quite general. The New York Code of Civil Procedure, which seems to be a fair illustration of these enactments, provides that every action must be

¹ *Roberts v. Jackson*, 1 Wend. (N. Y.) 485; *Meux v. Anthony*, 11 Ark. 422; 52 Am. Dec. 280; *Jackson v. Andrews*, 7 Wend. (N. Y.) 152.

² *Leitch v. Wells*, 48 N. Y. 608; *Parks v. Jackson*, 11 Wend. 442; *Jackson v. Losee*, 4 Sandf. Ch. (N. Y.) 381; *White v. Carpenter*, 2 Paige (N. Y.), 217; *Swett v. Poor*, 11 Mass. 549.

³ *Jackson v. Andrews*, 7 Wend. (N. Y.) 156; see *Murray v. Ballow*, 1 John. Ch. (N. Y.) 566, in which this subject is very elaborately considered by Chancellor Kent, where all the

cases are reviewed and the wisdom and policy of the rule are vindicated with learning and ability.

⁴ *Arnold v. Providence L. Co. (R. I.)* New Eng. Rep. 45; *Norton v. Birge*, 35 Conn. 259; *Jackson v. Andrews*, 7 Wend. (N. Y.) 152; see *Brightman v. Brightman*, 1 R. I. 119; *Sedgwick v. Cleaveland*, 7 Paige (N. Y.), 287; *Harmon v. Byram*, 11 W. Va. 511; *Lawrence v. Lane*, 9 Ill. 354; *Kern v. Hazelrigg*, 11 Ind. 443; *Murray v. Blatchford*, 1 Wend. (N. Y.) 583.

prosecuted in the name of the real party in interest, and any person may be made a defendant who has or claims to have an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the questions involved.¹

In many States special provisions are made regarding the parties in actions of ejectment, some of which are very brief while others are quite elaborate.

(1) ARKANSAS.

SECTION 2624. *Action for recovery of real property to be brought in the names of the real parties in interest.* An action for the recovery of real property shall be brought and prosecuted in the names of the real parties thereto.

Sec. 2625. *May be brought against the person in possession, or his lessor, or both.* It may be brought against the person in possession of the premises claimed, or his lessor, or both.

Dig. of the Statutes of Arkansas, ch. 55, page 590.

(2) COLORADO.

SECTION 255. *Who may bring action.* An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest.

Civil Code, 1887, p. 173.

(3) ILLINOIS.

SECTION 4. *Valid interest required.* No person shall recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial.

Sec. 6. If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the suit; and all other persons claiming title or interest to or in the same, may also be joined as defendants. (R. S. Ill. 1845, p. 205, § 4.)

R. S. Ill., 1889, 597.

¹ Howard's N. Y. Code, §§ 111 and 118.

(4) IOWA.

SECTION 3246. *Who may maintain the action, etc.* Any person having a valid subsisting interest in real property and a right to the immediate possession thereof, may recover the same by action, which may be brought against any person acting as owner, landlord, or tenant of the property claimed.

2 McClain's Statutes, 857.

A person who has taken possession of an erected improvement upon land under a parol license to mine, has such an interest in the real estate that the owner can not revoke the license at once, and the licensee may assert his right to possession by an action under this section. *Bush v. Sullivan*, 3 Greene, 344 (1857); *Beatty v. Gregory*, 17 Iowa, 109 (1864); 2 McClain's Statutes, 857.

Under this section the action may be maintained against the tenants of a non-resident. The statute of limitations does not reach as against such non-resident. *Heaton v. Fryberger*, 38 Iowa, 185 (1874); 2 McClain's Statutes, 857.

It seems the action can not be sustained against the holder of a tax certificate. *Eldridge v. Kuehl*, 27 Iowa, 160, 174 (1869).

(5) MAINE.

SECTION 5. *Demandant must have right of entry.* No such action shall be maintained, unless, at the time of commencing it, the demandant had such right of entry; and no descent or discontinuance shall defeat any right of entry for the recovery of real estate.

Sec. 6. *Who may be considered a disseizor; disclaimer in abatement but not in bar.* Every person alleged to be in possession of the premises demanded in such writ, claiming any freehold therein, may be considered a disseizor for the purpose of trying the right; but the defendant may plead in abatement, but not in bar, that he is not a tenant of the freehold, or he may plead it by a brief statement under the general issue, filed within the time allowed for the pleas in abatement, unless by leave of court the time therefor is enlarged; and he may show that he was not in possession of the premises when the action was commenced and disclaim any right, title or interest therein, and proof of such fact shall defeat the action; and if he claimed, or was in possession of only a part of the premises when the action was commenced, he shall describe such part in a statement signed by him or his attorney and filed in the case, and may disclaim the residue; and if the facts contained in such statement are proved on the

trial, the demandant shall recover judgment for no more than such part.

Sec. 7. *Defendant ousting demandant may be deemed disseizor.* If the person in possession has actually ousted the demandant, or withheld the possession, he may, at the demandant's election, be considered a disseizor for the purpose of trying the right, although he claims an estate therein less than a freehold.

R. S. Maine, 1883, ch. 104.

(6) MARYLAND.

SECTION 69. The action of ejectment shall be commenced by filing a declaration in which the real claimant shall be named as plaintiff, and the tenant in possession or party claiming adversely to the plaintiff shall be defendant; it shall be sufficient to state in the declaration that the plaintiff was in possession of the land or premises described in the declaration, and that the defendant ejected him therefrom and retains possession thereof, and the amount of damages claimed by the plaintiff, a copy of the declaration, with a writ of summons, as in other cases, addressed to the defendant, shall be served on each of the defendants, or if they can not be found, upon the person or persons in actual possession of the land described in the declaration, and if there be no person in possession of the premises, or if the same be unimproved vacant property, a copy of the declaration and summons shall be conspicuously posted and set up upon the premises, and notice of the object of the suit and of the substance of the declaration shall be published as the court shall direct, giving notice to the said defendants to appear to and defend the said action by a day to be named by the court, not less than twenty days from the first publication of said notice; to this declaration the defendant or any other person, with leave of the court, may appear and plead not guilty to the action, which plea shall be held a confession of the possession and ejectment, and shall only put in issue the title to the premises and right of possession and the amount of damages claimed by the plaintiff, but any defendant may refuse to appear or file a disclaimer of title to the land or any part thereof, in which case the plaintiff shall recover judgment against the defendant so disclaiming or refusing to defend for the land, or so much thereof as shall not be defended, but the

cost shall be subject to the discretion of the court, and the trial shall then proceed against the party making the defense under the rules and practice of the court as the same existed prior to the year eighteen hundred and seventy, except so far as the same are changed by this article, and the plaintiff shall also recover as damages the mesne profits and damages sustained by him and caused by the ejectment and detention of the premises up to the time of the determination of the case.

Pub. & Gen. Laws Md. 1888, p. 1128; *Mitchell v. Mitchell*, 21 Md. 585; *N. C. R. R. Co. v. Canton Co.*, 24 Md. 492; *Tongue v. Nutwell*, 31 Md. 302; *Mears v. Remare*, 33 Md. 251; *Mackenzie v. Renshaw*, 55 Md. 298; *Hecht v. Colquhoun*, 57 Md. 563; *Johnson v. Hines*, 61 Md. 132.

(7) MASSACHUSETTS.

SECTION 5. *Who may be considered as disseizor.* Every person who is in possession of the premises demanded in a writ of entry, claiming an estate of freehold therein, may be considered as a disseizor for the purpose of trying the right, whatever was the manner of his original entry on the premises.

G. S. Mass. 134, § 5; *Swan v. Stephens*, 99 Mass. 7 (1868); *Crandell v. City of Taunton*, 110 Mass. 419 (1872).

Sec. 6. *Same subject.* If the person in possession has actually ousted the demandant or withheld from him the possession of the premises, he may, at the election of the demandant, be considered as a disseizor for the purpose of trying the right, although he claims an estate less than a freehold.

G. S. Mass. 134, § 6; *Favour v. Sargent*, 6 Pick. 5 (1827); *Allen v. Holton*, 20 Pick. 458 (1838); *Wheelwright v. Freeman*, 12 Met. 154 (1846); *Hill v. Andrews*, 13 Cush. 185 (1853); *Dewey v. Bulkley*, 1 Gray, 416 (1854); *Dolby v. Miller*, 2 Gray, 135 (1854); *Munroe v. Ward*, 4 Allen 150 (1862); *Clouston v. Shearer*, 99 Mass. 209 (1868); *Crandell v. City of Taunton*, 110 Mass. 419 (1872); *Cole v. Inhabitants*, 124 Mass. 307 (1878); *Field v. Inhabitants*, 126 Mass. 327 (1879).

(8) MICHIGAN.

SECTION 3. *Who to be plaintiffs.* No person can recover in ejectment, unless he has at the time of commencing the action a valid subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial.

Sec. 4. *Who to be defendants.* If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named a defendant in the declara-

tion; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein at the commencement of the suit; and all persons claiming any title to the premises adverse to that claimed by the plaintiff, may in all cases be made defendants in such action.

R. S. Mich. 1882, Ch. 269.

(9) MISSOURI.

SECTION 4629. *Parties to actions.* The action shall be prosecuted in the real names of the parties thereto, and shall be brought against the person in possession of the premises claimed. (R. S. 1879, S. 2243—d.)

Sec. 4630. *Who may be made co-defendants.* The person from or through whom the defendant claims title to the premises may, on motion, be made a co-defendant. (R. S. 1879, S. 2244—e.)

R. S. Mo. 1889, Ch. 59.

(10) NEW JERSEY.

SECTION 3. *Who shall be defendant.* The defendant in the action shall be the person in possession, if the premises are occupied, or some person exercising ownership on the premises or claiming title thereto, in case they are unoccupied.

Sec. 4. *Whom plaintiff may join as defendants.* The plaintiff may join as defendant with the person in possession any other person who as landlord, remainderman, reversioner or otherwise may claim title to the premises adversely to the plaintiff.

R. S. N. J. 1877, 326.

(11) NEW YORK.

SECTION 3. *Who to be plaintiff.* No person can recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial.

2 R. S. N. Y. 1849, 399.

Sec. 4. *Who to be defendant.* If the premises for which the action is brought, are actually occupied by any person, such actual occupant shall be named defendant in the declara-

tion; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto or some interest therein, at the commencement of the suit.

2 R. S. N. Y. 1849, p. 399.

(12) TENNESSEE.

SECTION 3954. *How commenced.* The action is commenced by a summons and declaration, in which the name of the real claimant is sued as plaintiff, and the proper name of the defendant is inserted.

Sec. 3955. *Against whom.* The action is brought against the actual occupant, if any, and if no such occupant, then against any person claiming an interest therein, or exercising acts of ownership at the commencement of the suit.

Milliken and Vertree's Statutes 1884, page 762.

(13) TEXAS.

SECTION 4788. *Defendant, warrantor, etc., may be made a party.* When a party is sued for lands the real owner or warrantor may make himself, or may be made a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action.

Sec. 4789. *Landlord may become defendant.* When such action shall be commenced against a tenant in possession the landlord may enter himself as the defendant, or he may be made a party on motion of such tenant, and he shall be entitled to make the same defense as if the suit had been originally commenced against him.

Sec. 4790. *The possessor shall be defendant.* The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied.

R. S. Texas 1879, Title 96, ch. 1, p. 703.

(14) WISCONSIN.

SECTION 3074. *Who may recover in ejectment.* No person can recover in such action, unless he has at the time of commencing such action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established in such action.

Sec. 3075. *Occupant to be a party, etc.* If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the complaint; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the action.

R. S. Wis. 1878, ch. 133.

CHAPTER IV.

THE VENUE.

§ 1. The Venue Local.

2. The Venue in the Creation of New Counties.

§ 1. **The Venue.**—The question of the venue in actions for the recovery of the possession of real property is one capable of an easy solution. It must always, without exception, be brought in the county or jurisdiction district in which the lands are situated, for it is a local action in the most extensive sense of the term.¹

§ 2. **Venue—Creation of New Counties, etc.**—Under the Constitutions of the States, defendants in all judicial proceedings are entitled to a trial by a jury of the county or vicinage. The venue in actions of ejectment has always been regarded as local. The Legislatures have no power to authorize a trial outside of the county in which the premises in dispute are situated. But where the proper court of a county in which lands are situated lawfully acquires jurisdiction, and the Legislature afterward, by a change in county lines or the creation of a new county, takes the lands out of the county where the action is pending, it may save and continue by a proper saving clause to the court the jurisdiction thus lawfully obtained, which otherwise, by legislative action, would be lost, and the suit may be prosecuted to final judgment and execution, the same as if no legislative action had been taken in the matter.²

¹ Northern Ind. R. R. Co. v. Mich. W. Bla. 1070; Mayor of London v. Cent. R. R. Co., 15 How. 233; Putnam v. Bond, 102 Mass. 370; Draper v. Kirkland, 1 Head (Tenn.), 2; Blake v. Freeman, 13 Me. 130; Bellas v. Houtz, 8 Watts (Penn.), 373; Graves v. McKeon, 2 Denio (N. Y.), 639; Loeb v. Mathis, 37 Ind. 306; Watts v. Kinney, 6 Hill (N. Y.), 82; Atlantic, etc., Tel. Co. v. Baltimore, etc. R. R. Co., 14 J. & S. (N. Y.) 377; Hamer v. Raymond, 5 Taunt. 789; Doulson v. Matthews, 4 T. R. 503; Mayor, etc. v. Ewart, 2 W. Bla. 1070; Mayor of London v. Cole, 7 T. R. 587, 588; Mersey, etc., Nav. Co. v. Douglas, 2 East, 498, 499; Livingston v. Jefferson, 1 Brock. C. 203; Roach v. Damron, 2 Humph. (Tenn.) 425; Warren v. Webb, 1 Taunt. 379.

² Spalding v. Kelley, 66 Mich. 693; 33 N. W. Rep. 803 (1887); Cornell University v. Wis. Cent. Ry. Co., 49 Wis. 158; 5 N. W. Rep. 433 (1880); Blake v. Freeman, 13 Me. 130; see *contra*, Murdock v. Little, 18 Ga. 719.

CHAPTER V.

EJECTMENT BY MORTGAGOR AND MORTGAGEE.

- § 1. Mortgagor and Mortgagee.
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- 19. The Subject Further Discussed.
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- 21. The Mortgagee's Remedy.

§ 1. **Mortgagor and Mortgagee.**—The English doctrine of mortgages and the rights acquired thereby, do not seem to have been very popular in the United States. So far as the doctrine includes the right of the mortgagee to bring ejectment against the mortgagor, for the possession of the mortgaged premises, it seems to exist, however, in a modified form in Illinois, North Carolina, Vermont, Arkansas and perhaps some other States.¹ In discussing the action of ejectment as an element of this doctrine, we shall necessarily confine ourselves to the decisions of those States in which the right is preserved.

¹Oldham v. Pfleger, 84 Ill. 102; Pierce v. Brown, 24 Vt. 165; Sim-Withowski v. Watkins, 84 N. C. 458; mons v. Richardson, 32 Ark. 304.

The title of a mortgagee after forfeiture by reason of non-payment, is sufficient, at common law, to enable him to bring ejectment against the mortgagor, or other party in possession; and it is held, that he may immediately proceed by ejectment without any notice or demand of possession. *Carroll v. Ballance*, 26 Ill. 9; *Doe v. Maisey*, 8 Barn. & C. 767; *Fuller v. Wadsworth*, 2 Ired. (N. C.) 263; *Den v. Stockton*, 7 Halst. (N. J.) 322; *Ely v. McGuire*, 2 Ham. (Ohio) 223; *Rockwell v. Bradley*, 2 Conn. 1; *Wakeman v. Banks*, Ib. 445.

Ejectment lies on a mortgage payable by installments, before all the installments become due. *Smith v. Schuler*, 12 Serg. & R. (Pa.) 240.

Where there is an agreement that a mortgagee may dispose of the premises in case the interest is not paid annually, an action of ejectment will lie upon a failure to pay as agreed. *Alsop v. Peck*, 2 Root (Conn.), 224.

In New Jersey it has been held that the mortgagee does not divest himself of the right to maintain ejectment by filing a bill to foreclose, in connection with a second mortgagee, procuring an order of sale, and accepting the sheriff's deed for the premises. This is upon the principle that, if the sheriff's sale is valid, the mortgagee, having become the purchaser, can recover by virtue of the purchase and conveyance; and if the sale is not valid, then his title still remains. *Den v. Stockton*, 7 Halst. (N. J.) 322.

§ 2. **The Doctrine Not Uniform.**—The doctrine is not by any means uniform in the American States. In New York it has been held that the mortgagor is the owner of the land, not only as against third persons, but as against the mortgagee as well. A conveyance by the mortgagee intended to pass his interest as an estate and not as a security merely for a debt, would be wholly inoperative.¹ In an action of ejectment by the mortgagor against the assignee of the mortgagee, the court held that the mortgagee had a mere chattel interest, and the mortgagor must still be considered the proprietor of the freehold, the mortgage being deemed a mere incident to the land, or as security for the debt, and the assignment of the interest of the mortgagee in the land is a nullity.² In another case it was held that the mortgagor, or a purchaser of the equity of redemption, may maintain trespass against the mortgagee, or against a person cutting wood under his license off the mortgaged premises. The freehold is in the mortgagor, and in an action of trespass by a mortgagor against a mortgagee, if the defendant pleads *liberum tenementum*, the plaintiff may reply that the freehold is in himself.³ And again it was held that

¹ *Wilson v. Thorp*, 2 Cow. (N. Y.) ³ *Runyon v. Mersereau*, 11 Johns. 145; *Jackson ex dem. Titus v. Myers*, (N. Y.) 534.

¹¹ *Wend. (N. Y.)* 533.

² *Jackson ex dem. Curtis v. Bronson*,
19 Johns. (N. Y.) 325.

a mortgage creates only a specific lien on the land mortgaged, the same as a judgment duly docketed creates a general lien on the land of the judgment debtor. But the mortgagee, as such, has no title to the land mortgaged; he has neither *jus in re* nor *jus ad rem*, but a mere security for his debt, the title to the land, notwithstanding the mortgage, remaining in the mortgagor.¹

The rule in Illinois has been held, in accordance with the English courts of common law jurisdiction, that as an incident to his ownership in the mortgage, he can enter before condition broken, or bring ejectment. He is considered the owner of the fee, having the *jus in re* as well as the *jus ad rem*; and being so, is entitled to all the rights and remedies which the law gives to such owner.²

The common law remedy by ejectment is curtailed in the State of New York in the cases based upon mortgages. The action is peremptorily prohibited, not only in cases of mortgages in form, but in all cases where the parties in equity sustain the relation of mortgagor and mortgagee. A party making title to premises by the assignment of the legal title as security for a debt, holds the same in the character of mortgagee, and, as mortgagee, can not maintain the action for the possession of the premises. A deed of conveyance absolute upon its face, if intended for the security of a debt, is, in equity, a mortgage, and the same rule applies as in cases of regular mortgages. *Murray v. Walker*, 31 N. Y. 399; *Dahler v. Signer*, 37 Barb. (N. Y.) 329.

The statute of Wisconsin does not allow a mortgagee, or his assigns or representatives, to maintain ejectment to recover possession of the mortgaged premises, until the equity of redemption has expired; yet, if he is lawfully in possession after condition broken, he will not be turned out until his debt is paid. The same rule applies in case of a purchaser of the mortgaged premises at a sale under decree of foreclosure. In such case the purchaser succeeds to all the rights of the mortgagee, including the rights acquired by lawful possession after condition broken. An action of ejectment can not be maintained against him. *Tallman v. Ely*, 6 Wis. 244; *Gillett v. Eaton*, Ib. 30; *Hennesy v. Farrell*, 20 Ib. 42.

The statutes of Rhode Island recognize the common law right of the mortgagee to bring ejectment for the mortgaged premises after condition broken. Revised Statutes R. I., ch. 189, sec. 7.

As the statutes of Vermont stand, a mortgagee may have ejectment to recover possession of the mortgaged premises at any time after the day of payment is past, and that, too, without notice to quit, either against the mortgagor or his assignee. *Lyman v. Mower*, 4 Vt. 345; *Wilson v. Hooper*, 12 Ib. 653.

¹ *Gardner v. Hart*, 3 Denio (N.Y.), (Ill.) 202; *Van Sant v. Allman*, 23 Ill. 33; *Carroll v. Ballance*, 26 Ill. 232.

² *Delahay v. Clement*, 3 Scam. 17 (1861).

§ 3. **The English Rule—The Mortgage Conveys the Fee.**—In England and in some of the American States, it is understood that the ordinary mortgage deed conveys a fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition.¹

And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts, by the payment of the debt. It has been held that this right can not be restrained by a parol agreement that the mortgagor shall be allowed to remain in possession until forfeiture, for the reason that such an agreement is inconsistent both with the terms of the deed, and the provisions of the statute of frauds.²

So strict are the principles which obtain in such cases, and constantly applied in some States, that it is held that the rights of the mortgagee to the possession can not be defeated by the tender, or even by the payment of the debt, after the time fixed for its payment, for, by the old and rigid rule of covenants, the condition not having been performed on the day, the right of the mortgagor was gone at law, and the only redress for him was in equity.

By the common law, as enforced in the English courts, on the execution of the mortgage, the mortgagor becomes the equitable owner, the mortgagee the legal owner of the land, and they so remain respectively, until the land is redeemed or the equity foreclosed. As a consequence of this, results the doctrine that the mortgagee may maintain ejectment against the mortgagor before condition broken, and turn him out of possession. To avoid this, most English mortgages contain a clause, that until default made, the mortgagor, his heirs, etc., may hold and enjoy the land, and receive the profits, without interruption by the mortgagee or his heirs.

The interest of the mortgagee is regarded there, and in many of the States, as an estate, and may be conveyed by him to third persons by any of the usual modes of conveyance. Being a mortgagee in fee, it must follow that he has the legal

¹ Carroll v. Ballance, 26 Ill. 15 (1861); born, 13 N. H. 226; Northampton Pa-Coote on Mortgages, 339; Blaney v. per Mills v. Ames, 8 Met. (Mass.) 1. Bearce, 2 Greenl. (Me.) 132; Brown v. ² Carroll v. Ballance, 26 Ill. 15 (1861); Cramer, 1 N. H. 169; Hobart v. San-Colman v. Packard, 16 Mass. 39.

title to the estate, and consequently the same right to transfer it by deed that he has to convey by deed the legal title of any other real estate, subject only to the right of redemption existing in the mortgagor.¹

§ 4. **Further Discussion of the Subject.**—There is, perhaps, no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common law courts of England, and which has obtained, with certain limitations, in most of the States of the Union in which the common law system prevails.²

Courts of equity, however, from a very early period, took a widely different view of the matter; they looked upon the forfeiture of the estate at law because of non-payment on the very day fixed by the mortgage as in the nature of a penalty, and as in other cases of penalties, gave relief accordingly.³

This was done by allowing the mortgagor to redeem the land, on equitable terms, at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee, was called the "equity of redemption," and has continued to be so called

¹Carroll v. Ballance, 26 Ill. 16 226; Northampton, etc., v. Ames, 8 (1861); Givan v. Doe ex dem. Tout, 7 Met. (Mass.) 1; Carroll v. Ballance, 26 Blackf. (Ind.) 210. Ill. 9; Nelson v. Pinegar, 30 Ill. 481;

²Mulkey, J., in Barrett et al. v. Oldham v. Pflieger, 84 Ill. 102; Finlon Hinckley, 124 Ill. 33 (1887); Coote on v. Clark, 118 Ill. 32.

Mortgages, 339; Blaney v. Bearce, 2 ³Barrett et al. v. Hinckley, 124 Ill. Greenlf. 132; Brown v. Cramer, 1 N. 43 (1887).

H. 169; Hobart v. Sanborn, 13 N. H.

to the present time. These courts, looking at the substance of the transaction rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the incumbrance of the mortgage; that the interest of the mortgagee was simply a lien and incumbrance upon the land, rather than an estate in it. In short, the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity. These two systems grew up side by side, and were maintained for centuries without conflict, or even friction, between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus, equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to re-convey to the mortgagor, which was, of course, necessary to make his title available in a court of law.

In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country, resulting chiefly from a failure to keep in mind the distinction between courts of law and of equity, and the rules and principles applicable to them, respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of laws. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the States, and the failure of the courts and authors to note those changes in their expositions of the law of such States. Perhaps another fruitful source of confusion on this subject, is the fact that in many of the States the common law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that although the

action, in theory, is one at law, it is nevertheless subject to be defeated by a purely equitable defense.

Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has, in many of these States, entirely superseded the legal one. Thus, in New York, it is said that "a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon, the mortgagor remaining both the legal and equitable owner of the fee."¹ Following this doctrine to its logical results, it is held by the courts of that State, that ejectment under the code will not lie, at the suit of the mortgagee, against the owner of the equity of redemption.² In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York and others taking the same view, hold that a conveyance by the mortgagee, before foreclosure, without an assignment of the debt, is, in law, a nullity.³

The New York cases cited, and all others taking the same view, are clearly inconsistent with the whole current of the Illinois decisions on the subject. The doctrine would seem to be fundamental, that if one *sui juris*, having the legal title to land, intentionally delivers to another a deed therefor containing apt words of conveyance, the title, at law, at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt.⁴ It is true, the interest which passes is of no appreciable value to the grantee. Chancellor Kent said: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should

¹ Trustees, etc., v. Wheeler, 61 N. Y. 88. 90 Ill. 533; see Barrett v. Hinckley, 124 Ill. 44 (1887).

² Murray v. Walker, 31 N. Y. 399. ⁴ Mulkey, J., in Barrett v. Hinckley,

³ Jackson v. Curtis, 19 Johns. (N. Y.) 325; Wilson v. Troup, 2 Cow. (N. Y.) 231; Jackson v. Mileard, 4 Johns. (N. Y.) 41; Deland v. Bennett, 124 Ill. 32 (1888); Sanger v. Bancroft, 12 Gray (Mass.), 367; Barnard v. Eaton, 2 Cush. (Mass.) 304; Jackson v. Willard, 4 Johns. (N. Y.) 40.

be assigned the assignee must hold the interest at the will and disposal of the creditor who holds the bond.”¹ The rule has been thus stated: “By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs.”² In conformity with this view, Pomeroy, in treating of this subject, says: “In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death, intestate, it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such, and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee, a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator.”³

By the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper, but, on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness or even to a third party by deed, with apt words of conveyance, and the fact that it is, in form, an assignment, will make no difference.⁴

Such an assignee, if owner of the mortgage indebtedness, might, no doubt, maintain ejectment in his own name, for his own use; or the action might be brought in his name, for the use of a third party owning the indebtedness.⁵

It must not be concluded, from what has been said, that the dual system respecting mortgages, as above explained, exists in all the States precisely as it did in England, prior to its adoption in this country, for such is not the case. It is a conceded fact, that the equitable theory of a mortgage has, in process of time, made in some States material encroachments upon the legal theory which is now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns.⁶

¹ Kent, C., in *Jackson v. Willard*, 4 Johns. (N. Y.) 40.

² 4 Wait's Actions & Defenses, 565.

³ 3 Pomeroy's Equity Jur., 150; Mulkey, J., in *Barrett v. Hinckley*, 124 Ill. 38 (1888).

⁴ 2 Washburn on Real Property, 115, 116; *Barrett v. Hinckley*, 124 Ill. 33 (1888).

⁵ *Kilgour v. Gockley*, 83 Ill. 109.

⁶ *Hall v. Lance*, 25 Ill. 250; *Emory v. Keighan*, 88 Ill. 482.

As a result of this doctrine, it follows that in ejectment by the mortgagor, against a third party, the defendant can not defeat the action by showing an outstanding title in the mortgagee.

So, too, courts of law now regard the title of a mortgagee in fee, in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law.¹

The rule is as well established at law as it is in equity, that the debt is the principal thing, and the mortgage an incident. So, also, while it is indispensable in all cases to a recovery in ejectment, that the plaintiff show in himself the legal title to the property, as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title, he may, under all circumstances, maintain the action—and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests—that is, as a means of coercing payment. If the mortgagee, therefore, should, for a valuable consideration, assign the mortgaged indebtedness to a third party, and the latter, after default in payment, should take possession of the mortgaged premises, ejectment would not lie against him at the suit of the mortgagee, although the legal title would be in the latter, for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well settled principle, that one having a mere naked legal title to land in which he has no beneficial interest, and in respect to which he has no duty to perform, can not maintain ejectment against the equitable owner, or any one having an equitable interest therein with a present right of possession.²

The mortgagee, or any one succeeding to his title, may, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, though there is some conflict of authorities on this subject.³

¹ Pollock v. Maison, 41 Ill. 516; Gib- ² Barrett v. Hinckley, 124 Ill. 33
son v. Rees, 50 Ill. 333; Harris v. Mills, (1888).
28 Ill. 44.

³ 2 Washburn on Real Prop., p. 115.

§ 5. The Rule in Most of the States.—

(1) *Ejectment by mortgagee*: It is safe perhaps, to state as a general proposition of law in most of the American States, in some settled by judicial determination and in others by legislative enactments, that a mortgagee does not possess a title sufficient to sustain the action of ejectment for the possession of the mortgaged premises in any case.¹

In Florida the mortgagee can not obtain possession of the mortgaged premises until after a decree in foreclosure. *McMahon v. Russell*, 17 Fla. 698.

In Texas, the mortgagor of real estate remains the real owner of the land, and entitled to the possession thereof before and after the breach of the condition, and the mortgagee can not maintain an action to dispossess him. *Man v. Falcon*, 25 Tex. 271.

(2) *Ejectment by mortgagor*: It is held in most of the States that the mortgage is only a mere chattel interest, and a lien upon the mortgaged premises, as security for the payment of a debt.² The title of the premises remaining in the mortgagor, he is, as a matter of course, entitled to the possession against everybody, excepting the mortgagee lawfully in possession.³

(3) *By mortgagor against mortgagee*: Upon the payment of the mortgage debt, the title of the mortgagee, under the mortgage, reverts in the mortgagor or those claiming under him, without re-conveyance or release. The mortgagor can not, ordinarily, maintain an action for the recovery of the mortgaged premises from the mortgagee lawfully in possession, or those holding under such possession, until the mortgage is fully paid and satisfied.⁴

¹ See *Astor v. Hoyt*, 5 Wend. (N. Y.) 608; *Power v. Lester*, 23 N. Y. 527; 4 *Kent's Com.*, 194; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534; *Waters v. Stewart*, 1 Cai. C. (N. Y.) 47; *Trustees v. Wheeler*, 61 N. Y. 88; *Packer v. Rochester, etc.*, R. R. Co., 17 N. Y. 283; *Kortright v. Cady*, 21 N. Y. 343; *Trimm v. Marsh*, 54 N. Y. 599; *Madison, etc.*, Ch. v. *Oliver St. Ch.*, 73 N. Y. 82; *Dunning v. Fisher*, 20 Hun (N. Y.), 178; *Russell v. Ely*, 2 Black (U. S.), 577; *Souter v. La Crosse R. R.*, 1 Woolw. (U. S.) 80; *Olmsted v. Elder*, 5 N. Y. 144; *Pell v. Ulmar*, 18 N. Y. 139.

² *Olmstead v. Elder*, 5 N. Y. 144.

³ *Jackson v. Carswell*, 34 Ga. 279; *Souter v. La Crosse R. R.*, 1 Woolw. (U. S.) 80; *Bartlett v. Borden*, 13 Bush. (Ky.) 45; *McMillan v. Richards*, 9 Calif. 365; *Brobst v. Brock*, 10 Wall. (U. S.) 519; *Dayton v. Dayton*, 7 Ill. App. 136; *Fletcher v. Holmes*, 32 Ind. 497; *Turrell v. Warren*, 25 Minn. 9; *Carpenter v. Bowen*, 42 Miss. 28; *Taliaferro v. Gay*, 78 Ky. 496; *U. S. v. Athens Armory*, 35 Ga. 344.

⁴ *Husheon v. Husheon*, 71 Calif. 317; *Tryon v. Munson*, 77 Pa. St. 250; *Wright v. Wright*, 2 Halst. (N.

§ 6. **Notice to Quit.**—The relation of mortgagor and mortgagee is somewhat similar to that of landlord and tenant, but the mortgagor is not in the position of a yearly tenant of his mortgagee, and ejectment may be maintained against him after the forfeiture of the mortgage, without any previous demand for the possession or notice to quit.¹

§ 7. **Notice to Quit—Lessees of the Mortgagor.**—The underlessees of a mortgagor who have been let into possession subsequently to the execution of the mortgage and without the privity of the mortgagee, may be ejected, and it is immaterial whether they hold from year to year or by leases dated after the execution of the mortgage. In such cases it seems to be a universal rule that the occupant is in no event entitled to notice to quit, because the relation of landlord and tenant does not exist between him and the mortgagee.²

In an action by a mortgagee against a purchaser of the interest of the mortgagor or against a third person between whom and the mortgagor there is no privity of contract or estate, a previous notice to quit is not necessary. *Jackson v. Foster*, 4 Johns. (N. Y.) 215; *Jackson v. Stockhouse*, 1 Cow. 122; see *Thunder v. Belcher*, 3 East, 449.

If the words of the conveyance creating the mortgage operates as a re-demise of the premises to the mortgagor until default, it has been held that the mortgagor is entitled to notice or demand of possession after default, before ejectment can be maintained against him, but that, if the words do not so operate, he will not be so entitled, although the conveyance expressly stipulates that it shall be lawful for the mortgagee to enter into possession upon default, "after giving one month's notice." *Wheeler v. Montifore*, 2 Q. B. 133; *Doe v. Goldwin*, *Ib.* 143; *Doe v. Day*, *Ib.* 147.

J.) Law, 175; *Hannay v. Thompson*, 263; *Jackson v. Green*, 4 Johns. (N. Y.) 186; *Jackson v. Longhead*, 2 v. Oliver, etc., Church, 73 N. Y. 82; Johns. (N. Y.) 75; *Lyman v. Mower*, 6 Vt. 345; *Williams v. Bennett*, 4 Holt v. Rees, 44 Ill. 30; *Martin v. Ired.* 122; *Doe v. Giles*, 5 Bing. 421; *Fridley*, 23 Minn. 13; *Roberts v. Sutherland*, 4 Oreg. 219; *Wells v. Rice*, 34 Ark. 346; see also *Sherman v. Abbot*, 18 Pick. (Mass.) 448; *Pace v. Chadderdon*, 4 Minn. 499; *Hennesy v. Farrell*, 20 Wis. 42; *Odell v. Montross*, 68 N. Y. 499; *Conner v. Whitmore*, 52 Me. 185; *Gillett v. Eaton*, 6 Wis. 30; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248.

¹ *Wilson v. Hooper*, 13 Vt. 653; *Fuller v. Wadsworth*, 2 Ired. (N. C.)

² *Thunder v. Belcher*, 3 East, 449; *Jackson v. Chase*, 2 Johns. (N. Y.) 84; *Jackson v. Fuller*, 4 Johns. (N. Y.) 215; *Jackson v. Hopkins*, 18 Johns. (N. Y.) 487; *Jackson v. Stockhouse*, 1 Cow. (N. Y.) 122.

§ 8. Unlawful Possession by the Mortgagee.—Possession of the mortgaged premises by the mortgagee, when lawful, is generally treated in law for the purposes of collecting the rents and profits, and applying the same to the liquidation of the mortgage debt, and he has the right to retain possession until this end is fully attained; but the rule is otherwise when the possession by the mortgagee has been unlawfully obtained, and ejectment will lie against him without showing that the mortgaged debt has been paid.¹

§ 9. An Accounting, etc., an Essential Prerequisite of the Plaintiff's Case.—When the mortgagee in possession is in receipt of rents and profits sufficient to liquidate the entire mortgage indebtedness, the law requires that an accounting must be had of the indebtedness and the rents and profits, and the application in liquidation made in a court of equity, before the action of ejectment can be sustained for the possession of the premises. For, as it is said, the mortgagee in possession occupies the premises in a quasi fiduciary capacity in relation to the mortgagor, and is entitled to an accounting in a court of equity, and the application of the rents and profits to the mortgage indebtedness according to the rules in equity.²

§ 10. Ejectment the Proper Remedy to Recover Possession of the Lands from the Mortgagor's Tenant.—If, after the execution of the mortgage, the mortgagor leases the mortgaged lands, and the lessee takes possession under the lease, and while thus in possession, paying rent to the mortgagor, there is a forfeiture by non-payment of money due on the mortgage, the action of ejectment is the proper remedy in favor of the mortgagee to recover possession of the lands from the tenant.³

If the tenant in possession holds under a lease from the mortgagor executed subsequent to the mortgage, the mortgagee is entitled to his ejectment after default of the mortgagor, in the same manner as though the tenant in possession was an actual purchaser of the premises from the mortgagee. *Den v. Stockton*, 7 Halst. (N. J.) 322.

§ 11. Purchasers of the Equity of Redemption.—As a general proposition, the mortgagor, after the execution and

¹ *Husheon v. Husheon*, 71 Calif. 417; *Madison, etc., Church v. Oliver*, etc., Church, 73 N. Y. 82; *Russell v. Ely*, 2 Black (U. S.) 575; *Strang v. Allen*, 44 Ill. 428. ² *Hubbell v. Moulson*, 53 N. Y. 222; *Ruckman v. Astor*, 9 Paige Ch. (N. Y.) 517; *New England, etc., Co. v. Merriam*, 2 Allen (Mass.), 390. ³ *Bank v. Bates*, 11 Conn. 519.

delivery of his mortgage, still continues the owner of the land, and seized of it against all persons but the mortgagee, or those who claim under him; and he has, therefore, a right to convey the estate mortgaged, defeasible only by the mortgagee, or some person having his right; and if he conveys, thus having a right to convey by deed executed, acknowledged and recorded, the purchaser will be deemed actually seized, without entry or livery of seizin.¹

Under statutes in many States, the rights in equity of redeeming real estate mortgaged is liable to be sold on execution, and upon such sale being made, the sheriff conveys the debtor's right in equity to the purchaser, his heirs and assigns, with the same effect as if the debtor had himself executed the deed.

The purchaser, thus having a legal right to the equity of redemption, has also a legal seizin of the land, when neither the mortgagee nor his assigns have entered, subject, however, to their claim, and may maintain an action of ejectment against any stranger, unless such stranger had, in fact, disseized the mortgagor before the sale of the equity.²

Perhaps it may be stated as a general rule, applying in all cases of this kind, that the purchaser of an equity of redemption can aver no seizin or title against any other person than the mortgagor as execution debtor, or his immediate tenants or assigns.³

§ 12. **The Assignee's Remedy—The Law Stated by Dickey, J.**—Though the assignee of a mortgage and of the note secured by the mortgage, may not be able to maintain an action upon the mortgage in his own name by virtue of such assignment, nevertheless, being the lawful owner of the note, he has the right to use all remedies necessary for the collection of it, and has the right to use the name of the mortgagee in enforcing any remedies which, by law, can be made available for that purpose. He may bring ejectment in the name of the mortgagee, and the assignment of the note and mortgage will be a full authority for such use of the name of the mortgagee, and,

¹ Willington v. Gale, 7 Mass. 138 (1812); Tuttle v. Brown, 14 Pick. (1810); Porter v. Millet, 9 Mass. 101 (Mass.) 514 (1833). (1812).

³ Forster v. Mellen, 10 Mass. 421

² Willington v. Gale, 7 Mass. 138 (1813). (1810); Porter v. Millet, 9 Mass. 101

after judgment in such ejectment in his favor and against the mortgagor, the assignee of the mortgage can lawfully accept the possession in the name of the mortgagee, acting as the agent of the mortgagee and for his own benefit.

It is not perceived why such assignee may not, in like manner, take peaceable possession without action at law, nor why, having so taken possession, he may not lawfully hold it as against the mortgagor or his heirs or grantees, invoking for that purpose, the name and title of the mortgagee. His possession under such circumstances would be lawful possession. Ejectment can never be maintained against an occupant, so long as he is lawfully in possession.¹

The assignees of a mortgagee may bring ejectment to recover the premises the same as their assignor might have done before the assignment. It has been held that the assignment should be recorded before the action can be brought. *Pratt v. Bank*, 10 Vt. 253.

If the mortgagee assigns the mortgage, and his assignee assigns it to another, the last assignee may maintain ejectment for the mortgaged premises. *Smarth v. Williams*, 1 Salk. 245.

§ 13. The Subject Further Discussed.—The tenant of a mortgagee may avail himself of the mortgage as a defense, because his relations with the mortgagee give him the right to invoke his title or right to possession. The same reason applies with equal force in favor of the assignee of a mortgagee. Where both the note and mortgage are assigned, the assignee in possession must be regarded as holding under the mortgagee. In substance the assignment of a note and mortgage is a power of attorney or license by the mortgagee to the assignee to collect for his own use the mortgage debt, and to that end to use the name of the mortgagee in all appropriate remedies. One of these remedies is to take possession of the mortgaged premises and hold possession thereof until full payment. Such possession, when taken, is a legal possession, and constitutes a legal defense to an action of ejectment brought by the mortgagor or by any one claiming under the mortgagor by a chain of title junior to that of the mortgagee.²

§ 14. Sale of Premises by the Mortgagor.—It is a familiar principle, that after condition broken, ejectment may be maintained by the mortgagee against the mortgagor, or those to whom he may have assigned the equity of redemption. The

¹ *Kilgour v. Gockley*, 83 Ill. 109 (1876). ² *Hall v. Lance*, 25 Ill. 277.

mortgagor can invest his grantee with no greater title than he possessed, or put him in better condition than he occupied himself. The purchaser of the mortgaged premises from the mortgagor stands in the shoes of the mortgagor, and is charged with notice of the mortgage and its legal effect. He succeeds to the rights of the mortgagor, but is in no better condition. The failure to make him a party to a proceeding to foreclose the mortgage does not affect the validity of the decree, but the grantee's right of redemption is unaffected by it.¹

§ 15. Prior and Junior Mortgagees as Plaintiff and Defendant.—In ejectment when both parties, plaintiff and defendant, are mortgagees, both claiming under a common mortgagor, the party holding the oldest mortgage who first forecloses and acquires a deed, must prevail as having the paramount legal title. If the party holding the junior mortgage has equitable rights in the lands in question by reason of his not having been made a party to the proceedings in foreclosure, he must resort to the equity side of the court.²

In Connecticut, a mortgage, though a form of a conveyance of the legal title, is, in substance, only a pledge of the land for the mortgage debt, and the mortgagee is to be regarded as holding the legal title only for the purpose of enforcing payment of the debt. A second mortgagee can maintain ejectment against the mortgagor, although there is an outstanding unsatisfied prior mortgage. *Savage v. Dooley*, 28 Conn. 411.

A mortgagor in possession whose interest in the mortgaged premises has been levied upon and sold under an execution, may, in an action of ejectment against him by the purchaser, protect his possession by a lease for years from his mortgagee, whose mortgage was prior to the levy. *Simmons v. Brown*, 7 R. I. 427.

If there are two several mortgages upon the same lands, the mortgagee who has the legal estate will be entitled to recover in ejectment against the other mortgagee, although his mortgage be posterior in point of time. *Goodtitle v. Morgan*, 1 T. R. 755.

§ 16. A Deed Absolute, as a Mortgage.—In Wisconsin and perhaps in the majority of the States, a mortgage upon land is a mere lien or security. The title remains in the mortgagor and the mortgagee holds the mortgage as such mere security for the debt. So stringent is this rule that it has often been held by the courts that a deed in fee simple absolute, given merely to secure a debt with a parol defeasance, is nothing

¹ *Kelgour v. Wood*, 64 Ill. 345; ² *Aholtz v. Zellar*, 88 Ill. 24 (1878).
Kruse v. Scripps, 11 Ill. 98; *Jackson v. Warren*, 32 Ill. 340; *Taylor v. Adams*, 115 Ill. 570 (1886).

more nor less than a mortgage, leaving the title in the grantor and giving the grantee a mere security for his debt, to be enforced in the same manner as an ordinary mortgage.¹ Such a deed will be declared to be a mortgage upon purely equitable grounds only, and the burden of showing this is upon the party who asserts that the deed is a mortgage. The evidence must be clear and conclusive and leave no doubt upon the question of the real intention of the parties.²

§ 17. **Defenses—The Mortgagor May Show an Eviction in Bar of the Action.**—In an action by a mortgagee for the recovery of the possession of mortgaged premises, against the mortgagor, the latter may set up in bar of the recovery an eviction by one having a paramount title; and although the mortgagor has become the purchaser under the paramount or hostile title, and remains in possession, the mortgagee can not recover. Like a tenant he may show that his landlord's title is at an end.³

§ 18. **Statute of Limitations—Mortgagor and Mortgagee—If the Debt Is Barred the Right of Possession Is Barred.**—Under the common law, as announced by the courts of England, as well as of the various States of the Union, the failure of the mortgagee to make an entry, to receive interest on the debt, or in some other mode to procure a recognition of the validity of his debt within the statutory period of limitation, a payment will be presumed, and a foreclosure defeated, both at law and in equity. Specialty debts and contracts for the payment of money were not embraced in the act of 21 James I, and as mortgages executed in England usually contained a covenant for the payment of the mortgage debt,

¹ Wis. Cent. R. Co. v. Wis. Riv. Ld. Conn. 359; Weide v. Gehl, 21 Minn. Co., — Wis.; 36 N. W. Rep. 837 (1888); 449; Steinruck's Appeal, 70 Pa. St. 289; Schriber v. LeClair, 66 Wis. 528; 29 Hills v. Loomis, 42 Vt. 562; Kent v. N. W. Rep. 570, 889; Bernstein v. Agard, 24 Wis. 378; Carr v. Carr, 52 Humes, 71 Ala. 265; Hoyt v. Fass, 64 N. Y. 251; Hassam v. Barrett, 115 Wis. 279; 25 N. W. Rep. 45. Mass. 256; Horn v. Keteltas, 46 N. Y.

² Henley v. Hotaling, 41 Calif. 22; 605, 251; Murray v. Walker, 31 N. Y. Phillips v. Croft, 42 Ala. 477; Kent v. 399; McBurney v. Wellman, 42 Barb. Lasley, 24 Wis. 654; Price v. Karnes, (N. Y.) 390; Dodge v. Wellman, 43 59 Ill. 276; Fullerton v. McCurdy, 55 How. Pr. (N. Y.) 427; Odell v. Mont- N. Y. 637; see, also, Villa v. Rodriguez, 68 N. Y. 499.

³ Jackson v. Vredenburg, 5 Wend. v. Davis, 50 Miss. 403; O'Neil v. Cap- (N. Y.) 44. elle, 62 Mo. 202; French v. Burns, 35

the mortgage, and the bond to secure which it was given, were held to be without statutory bar.

But upon principle and the analogies of the common law, the debt was presumed to have been paid or otherwise discharged, if no payment was made on the debt, or possession of the mortgaged premises was not taken, or some other act done by which it appeared the parties recognized the debt as subsisting within the statutory period after its maturity. The mortgagee under such a mortgage had a right to maintain an action for the recovery of the money on the covenant in his mortgage, or to bring ejectment and be admitted to the possession of the mortgaged premises and the perception of the rents and profits until he had satisfaction of his debt.

Chief Justice Kent lays down the rule that the mortgagee may be barred by the lapse of time; and if the mortgagor has been permitted to possess and enjoy the estate without account and payment of principal or interest, or claim for a given period, which is usually twenty years, the mortgage debt is presumed to be extinguished. He further says: "The period of twenty years is taken by analogy to the period of limitation at law, for tolling the entry of the true owner."¹ This doctrine runs through the English and American adjudicated cases, in both the courts of law and equity.² The cases proceed upon the principle, that, while the mortgage is an incident of the debt—only a security for the money—yet by it, a right to recover the possession of the premises, as a means of satisfaction, is conferred by the mortgage, and to enforce that right, ejectment may be maintained as long as a recovery may be had by action on the debt.³

The action of ejectment may be maintained on a mortgage in Vermont, and the mortgaged lands recovered; though the statute of limitations has run on the debt. *Reed v. Shipley*, 6 Vt. 602.

A mortgagor can not recover in ejectment against a mortgagee who is in adverse possession after the law day of the mortgage; nor can one who claims under the mortgagor recover against one holding by privity of title with the mortgagee, unless the conveyance is void. *Jones v. Roper*, 86 Ala. 210; 5 So. Rep. 459 (1889).

¹ 4 Kent's Com. 189.

² Walker, C. J., in *Pollock v. Mai-son*, 41 Ill. 519 (1866); *Hillary v. Wallace*, 12 Ves. 239; *Cook v. Lat-tan*, 2 Sim. & Stu. 154; *Wilson v.*

Withesley, Bull. N. P. 110; *Hughes v. Edwards*, 9 Wheat. 489; *Giles v. Baremore*, 5 Johns. Ch. 545.

³ *Pollock v. Maison*, 41 Ill. 519 (1866).

§ 19. **The Subject Further Discussed.**—The authorities all concur in holding that the mortgagee may make entry after condition broken, and some of them even hold that he may enter on the execution of the mortgage and before there is any breach; also, that the right of entry is tolled by the statute of limitations, as in other cases. And courts of equity follow the law, in regard to such a bar, and hold that, by analogy, when the right of entry under the mortgage is barred, the right to foreclose is usually also barred upon the presumption that the debt has been discharged. And bonds and other sealed instruments for the payment of money, under the English decisions, were governed by the same presumption after such a lapse of time after their maturity. We may then safely adopt the rule, that, where the entry is tolled, the foreclosure is barred.

The object and effect of all limitations of real actions is to toll the entry or bar the action, and this is true whether the entry is barred in seven or in twenty years. But under our legislation the effect would be very different on the security for the debt. In sixteen years the debt is barred in Illinois; hence, to hold that the entry is taken away after that time, could produce no injury to the creditor; but to hold the entry was barred, and the right to foreclose was gone in seven years, would be to deprive him of the security of his debt nine years before it would be barred. But to hold, that, when the debt is barred, then the entry is barred, and the right to foreclose is gone, is only in analogy to the English and American rule that, when the presumption is raised that the debt is extinguished, the entry will be tolled. In a Vermont case the English rule was applied. It was there held that, where the right of entry is gone, in fifteen years under their statutes, a foreclosure by bill is also barred.

The court say: "The presumption of payment of a mortgage becomes absolute, after the lapse of fifteen years, if there is no entry, or payment of interest, and is conclusive unless refuted by distinct proof."¹ If, because the entry under the mortgage as one of the modes of foreclosing or obtaining satisfaction may be held to bar the other modes of foreclosing, it is manifestly more reasonable to hold that where the debt, the principal thing, is gone, the incident, the mortgage, is gone

¹ Whitney v. French, 25 Vt. 663.

also, and that a foreclosure in any mode can not then be had, either by ejectment, *scire facias*, bill in equity or otherwise.

If a bar of the incident should bar the principal, then much more should a bar of the debt be a bar to its incident. A payment, release or discharge of the debt, extinguishes the mortgage. If a judgment or decree in bar of the debt were rendered in favor of the mortgagor, no one would for one moment hesitate to say that it might be interposed as a complete bar to a foreclosure in any of the various modes which may be adopted. Then why not permit the bar that would defeat a recovery on the debt be interposed to defeat a foreclosure? It was so held in Illinois, and we think the rule is sustained by the analogies of the law, and is not opposed to the principles of justice.²

While, therefore, an action of ejectment may be maintained, or a bill exhibited, or a judgment recovered by *scire facias* on the mortgage, at any time before the statute of limitations has barred the debt, where that has occurred we believe the bar of the statute may be successfully interposed in an action of ejectment by the mortgagee.³

§ 20. **A Distinction Which Does Not Appear in the Books.**—There seems to be great propriety in a distinction which might be made, though the books do not appear to recognize it, between a mortgage executed for money loaned, or for the performance of some other obligation, where the consideration passes from a stranger to the owner of the land mortgaged, and a mortgage executed to secure the payment of the purchase money of the land itself, which are quite as common in the transactions of the day as those actually given on the loan of money. In the first class of cases, a mortgage may properly be regarded as an incident or security, merely for the repayment of the money actually loaned, the lender never having had an interest in the land mortgaged as security.

A mortgage of the other description, given to secure the payment of the purchase money of the land itself, ought to be

¹ Walker, C. J., in *Pollock v. Maison*, 41 Ill. 518 (1866). *Cox*, 37 Iowa, 570; *Ewell v. Daggs*,

² *McMillan v. McCormick*, 117 Ill. 108 U. S. 143. 79 (1886); *Harris v. Mills*, 28 Ill. 44; ³ *Pollock v. Maison*, 41 Ill. 516 Midley v. Elliott, 62 Ill. 532; *Flower* (1867); *Medley v. Elliott*, 62 Ill. 533; *v. Ellwood*, 66 Ill. 438; *Darst v. McMillan v. McCormick*, 117 Ill. 79 Bates, 95 Ill. 493; *Hogan v. Parsons*, (1886).

regarded as something more than a mere security for money loaned, no money being in fact loaned. The vendor of land, by his deed, clothes his grantee with power to enter and take possession of the land—to grant it away to strangers—to deprive the vendor of all use of it. The mortgage is executed to secure the vendor in the purchase money, on the promise of which, at a certain day, he surrenders the possession to the mortgagor. Now, different considerations operate upon the parties in these cases. In the first, the mortgagee only stipulates for the return of his money; his only consideration is, that the security shall be ample, and it is, in practical life, rarely, if ever, understood by the parties to such a mortgage, to pass the title in fee of the land to the mortgagee, so as to vest in him the power to enter on condition broken, or bring ejectment and turn the mortgagor out of possession. The debt may be very trifling in comparison to the value of the land mortgaged, and so long as its ultimate payment is fully secured, such mortgagee should be content with the usual remedies allowed him by the law, to proceed by *scire facias* under statutes, or by bill in equity for a strict foreclosure, or for a foreclosure and sale or by suit on the note, and thus receive the full benefit of what the parties intended should be security. In justice and equity his principal right is to his money only.

In the other class of cases, and they are perhaps the most numerous, something more than mere security must be in contemplation of both parties. The title to the fee ought not to be held as having passed absolutely out of the vendor. It is in him when he sells, and should be considered as passing out of him only by the payment of the purchase money. There would seem to be a great propriety in conceding to such a mortgagee all the rights the true owner of the fee can exercise—the right of entry, or the action of ejectment on condition broken, and not before. It is his estate, the title to which he has never in fact parted with, except upon a condition which has not been performed. It is, then, but sheer justice that the possession should be restored to him. But the law seems to make no distinction in these cases.¹

§ 21. **The Mortgagee's Remedy.**—The remedy of the mortgagee under his mortgage upon breaches of the condition, is not uniform in the American States. In the majority of these

¹ Breese, J., in *Carroll v. Ballance*, 26 Ill. 17 (1861).

the remedy is by foreclosure in the courts or by advertisement and sale outside of the courts. The remedy of ejectment, if not abolished, is very rarely employed. In Massachusetts the remedy is by a suit in equity¹ or by a writ of entry.² In Illinois, where the usual practice is to make promissory notes as evidence of the indebtedness and to secure their payment by the execution and delivery of a mortgage upon real property, the relentless creditor may, upon a default in payment, pursue his unfortunate or delinquent debtor with a suit in ejectment for the immediate recovery of the possession of the mortgaged premises, and have at the same time as existing concurrent remedies, a suit in chancery upon a bill to foreclose his mortgage, a writ of *scire facias* issued from the common law court, for the same purpose, and also an action of assumpsit to recover the amount of the indebtedness due upon the notes.³ These concurrent remedies are in many States restricted upon the theory that they enable the money lending portion of the community to oppress the unfortunate borrower. The legislators of Illinois seem to have acted upon the theory that the laws allowing ample and concurrent remedies for the collection of debts, are mere matters of business and tend to stimulate its citizens to the prompt payment of their debts when due and the discharge of all business obligations in business-like manner. It is possible that the phenomenal prosperity of that State is in some measure due to the enactment of these laws.

¹ Pub. Statutes, Mass. 1882, p. 837. Ed., 605; Van Sant v. Allmon, 23 Ill.

² Pub. Statutes, Mass. 1882, p. 841. 33; Carroll v. Ballance, 26 Ill. 9.

³ Puterbaugh's Common Law, 6th

CHAPTER VI.

TENANTS IN COMMON AND JOINT TENANTS.

- § 1. Joint Tenants—The Estate Defined.
- 2. Co-tenants Tenants in Common—The Estate Defined.
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- 30. Mortgagees as Tenants in Common.
- 31. Tenants in Common and Joint Tenants—Statutory Provisions.

§ 1. **Joint Tenants Defined—The Estate.**—Joint tenants are two or more persons to whom are granted lands or tenements to hold in fee simple, fee tail, for life, for years, or at will. The estate which they thus hold is called an estate in joint tenancy.¹ Joint tenants always take by purchase and necessarily have equal shares. While tenants in common,

¹Wright v. Searles, 59 How. Pr. 406; 2 Blackstone, Com., 179; 3 Coke (N. Y.) 176; 1 Washburn, Real Prop., on Littleton, 180.

claiming under ancestors in different degrees, may have unequal shares.¹

Estates in joint tenancy are not favored in law. They will not be inferred in any case when the person creating the estate did so for the purpose of division or of making improvements, and the estate will be considered an estate in common and the owners tenants in common, although the instrument creating the estate designates it as an estate in joint tenancy. *Duncan v. Forrer*, 6 Binn. (Penn.) 193; *Martin v. Smith*, 5 Binn. (Penn.) 16.

In Massachusetts the statute converts estates held in joint tenancy into tenancies in common, where the right of survivorship has not accrued. *R. S. Mass.* 1885, ch. 62, § 54; *Miller v. Miller*, 16 Mass. 59; *Annable v. Patch*, 8 Pick. (Mass.) 360.

§ 2. Co-tenants or Tenants in Common—The Estate Defined.—Co-tenants or tenants in common are persons who hold lands or tenements by several and distinct titles, but by a unity of possession. They may acquire their estate by purchase, and hold by several and distinct titles or by title derived at the same time by the same deed or will, or by descent. According to the English common law this estate is created by deed or will, or by change of title from joint tenancy or co-parcenary; or it may arise by construction of law.²

Where a vendor gave a bond for a deed and received part of the purchase price, the fact that he afterward entered into an agreement with the vendee and others, declaring that the vendee held the same in trust for the use of all the parties, did not make the vendee a tenant in common with the vendor, as he only took an equitable estate by the bond, which might be foreclosed on failure to comply with its terms. *Fairchild v. Mullan* (Cal.), 27 Pac. Rep. 201; *Am. Dig.* 1891, 4251.

A sale of standing timber on designated land, to be cut and removed at a specified rate, vests the exclusive title to the timber in the purchasers, and leaves the exclusive title to the land in the sellers, and does not make the purchasers and seller tenants in common in either the land or the timber. *Distinguishing Wheeler v. Carpenter*, 107 Pa. St. 271; *Dexter v. Lathrop*, 136 Pa. St. 565; 26 W. N. C. 504; 20 Atl. Rep. 545 (1891.)

Having succeeded to a homestead right in her husband's interest in certain land, a third wife became a tenant in common with the heirs of the second wife, and could not avail herself of the statute of limitations against them until she had repudiated their rights. *McDougal v. Bradford* (Tex.), 16 S. W. Rep. 619 (1891).

The rule that a deed conveying land to several persons by name, and not stating the interest devised to each, necessarily conveys to them a joint title, does not obtain where the proof shows that one of the grantees contributed

¹*Campan v. Campan*, 44 Mich. Kent's Com., 363, 368, note 6; 1 Bouvier's Law Dic., 480, Tit. Estates in Joint Tenancy; 11 Am. & Common; 2 Blackstone's Com., 192; Eng. Ency., 1058. *Abbott's Law Dic.*, Title, Tenants in

²*Washburn, Real Prop.*, 415; 4 Common.

one-half of the purchase price, and the other grantees the other half, as such contribution fixes the proportion of the ownership. *Oxford v. Barrow* (La.), 9 So. Rep. 479; Am. Dig. 1891, 4252.

Where it is shown that the property claimed was once jointly owned by heirs, who inherited jointly from their ancestors and their brothers and sisters, the condition of indivision and joint ownership will be presumed to have continued unless it be satisfactorily proven that the parties have parted with their title. *Simon v. Richard*, 42 La. 842; 8 So. Rep. 629 (1891).

§ 3. **Co-parceners and Estates in Co-parcenary.**—An estate in co-parcenary is one of inheritance in which lands descend from the ancestor to two or more persons who are called co-parceners or parceners. It was usually applied in England to cases where lands descended to females for want of male heirs; but in the United States, as estates generally descend to all children, males and females alike, there is no substantial difference between co-parceners and tenants in common.¹

§ 4. **Properties of These Estates.**—The properties of an estate in joint tenancy are derived from its unity, which is fourfold. (1) The unity of interest; (2) the unity of title; (3) the unity of time; and (4) the unity of possession; or in other words, joint tenants have one and the same interest accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.² The properties of an estate in common or one held by co-tenants is that of unity of possession alone.³

§ 5. **Ejectment by Co-tenants—Joint Tenants and Co-parceners.**—The action of ejectment may be maintained by a co-tenant, joint tenant or co-parcener against his companion in the estate in all cases where there has been an actual ouster; this rule is founded upon the maxim of the common law, that the possession of one co-tenant, joint tenant or co-parcener, is *prima facie* the possession of his companion also.⁴ Each tenant in common or joint tenant has an equal right to the possession and enjoyment of the common property. But the pos-

¹ 4 Kent's Com., 363; 2 Blackstone, 2604; *Mining Co. v. Taylor*, 100 U. S. Com., 189. 37; *Humbert v. Trinity Church*, 24

² *Ewell's Essentials of the Law*, 174; *Wend. (N. Y.)* 587; *Vaughan v. 2 Blackstone, Com.*, 180. *Bacon*, 15 Me. 455; *Young v. De*

³ *Ewell's Essentials of the Law*, 179; *Bruhl*, 11 Rich. (S. C.) L. 638; *Clymer 2 Blackstone, Com.*, 192. *v. Dawkins*, 3 How. (U. S.) 674;

⁴ *Doe v. Keen*, 7 T. R. 386; *Ford v. Campau v. Campau*, 44 Mich. 31; *Gray, Salk*. 285; *Smales v. Dale, Hob. Allen v. Hall*, 1 McCord (S. C.), 131; 120; *Fairclaim v. Shackleton*, 5 Burr. *Lillianskyoldt v. Goss*, 2 Utah, 292;

session of one is the possession of all and one can not eject his companion, whose possession is not inconsistent with his own.¹

It has been held, however, in a few cases, that the action may be maintained though no actual ouster be shown. *Sheppard v. Rogers*, 15 Johns. (N. Y.) 501; *Eads v. Rucker*, 2 Dana (Ky.), 111.

The weight of authority supports the rule requiring an actual ouster, but in many States statutes exist materially modifying the rule.

In New York the statute provides that if the action of ejectment is brought by one or more tenants in common, or joint tenants, against the co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give, shall be required to prove, on the trial of the cause, that the defendant actually ousted such plaintiff, or did some other act amounting to a total denial of his right as such co-tenant. 2 R. S. N. Y., Stat. at Large, p. 315, § 27. In Illinois and other States similar statutes exist. R. S. Ill. 1845, p. 207, § 21.

One joint tenant or owner may sustain ejectment upon a title acquired by adverse possession against another. *Russell v. Marks*, 3 Met. (Ky.) 37.

The law is, that nothing but an actual ouster, by one tenant in common, shall give him the exclusive possession. *Fairclaim v. Shackleton*, 5 Burr. 2604; *Carothers v. Lessee of Dunning*, 3 Serg. & R. (Penn.) 385; *Barnitz's Lessee v. Casey*, 7 Cranch (U. S.), 557; *Higbee v. Rice*, 5 Mass. 351; *Doe v. Roe*, 2 Taunt. 397.

§ 6. **What is an Actual Ouster.**—What particular acts amount to an actual ouster must of course depend upon the circumstances of each particular case, and is very often a question not easy to determine.

An actual ouster may be effected either by physical force or by a denial by one co-tenant of the rights of his companion in the estate and the assertion of an adverse possession.²

An assertion by a joint owner of lands of an exclusive right to the whole, and a contracting to sell the whole, are evidence of adverse possession, and

Covington v. Stewart, 77 N. C. 148; 351; *Noble v. McFarland*, 51 Ill. 226; *Bowen v. Preston*, 48 Ind. 367; *Foulke* Ewald v. Corbett, 32 Calif. 493; *v. Bond*, 12 Vroom (N. J.), 527; *Miller* Young v. De Bruhl, 11 Rich. (S. C.) *v. Myers*, 46 Calif. 535; *Phillips v.* L. 638; *Story v. Saunders*, 8 Humph. (Tenn.) 663; *Gale v. Hines*, 17 Fla. *Gregg*, 10 Watts (Penn.), 158; *Challe-* 773; *Cutts v. King*, 5 Geo. 1. (Me.) *foux v. Ducharme*, 8 Wis. 287. 482; *Doe v. Hill*, 10 Leigh (Va.) 457;

¹ *Erwin v. Olmstead*, 7 Cow. (N. Y.) 229; *Warren v. Henshaw*, 2 Aik. (Vt.) 141; *Gower v. Quinlan*, 40 Mich. 572. *Edwards v. Bishop*, 4 N. Y. 61; *Halford v. Tetherow*, 2 Jones (N. C.) L. 393; *Jones v. Weatherbe*, 4

² *Siglar v. Van Riper*, 10 Wend. (N. Y.) 414; *Gilchrist v. Ramsay*, 27 U. C. 500; *Trapnall v. Hill*, 31 Ark. 345; *Harvin v. Hodge*, *Dudley* (S. C.) L. 23; *Cross v. Robinson*, 21 Conn. 379; *Higbee v. Rice*, 5 Mass. *Strobh.* (S. C.) L. 50; *Norris v. Sul-* *livan*, 47 Conn. 474; *Bethell v. Mc-* *Cool*, 46 Ind. 303; *Sharp v. In-* *graham*, 4 Hill (N. Y.) 116; *Jones v.* *Perkins*, 1 Stew. (Ala.) 512; *Day v.* *Howard*, 73 N. C. 1.

such an ouster as to enable the co-tenant to maintain ejectment. *Carpenter v. Thayer*, 15 Vt. 552.

A joint tenant can not sue his co-tenant except he be ousted of the joint possession, and it is an ouster where the defendant overflows the common land by water from a mill pond, thus appropriating it to his exclusive use. *Jones v. Weathersbee*, 4 Strobh. (S. C.) L. 50.

The mere pernanacy of all the profits by one tenant in common, is not an ouster of another tenant in common. *Higbee v. Rice*, 5 Mass. 351.

A bare perception of profits will not oust a tenant in common; and for the statute of limitations to operate as a bar, the possession must be adverse. *Morris' Lessee v. Van Deren*, 1 Dall. (U. S.) 67; *Lloyed v. Gordon*, 2 Harr. & M'Hen., (Md.) 260; *M'Clung v. Ross*, 5 Wheat. (U. S.) 124; *Cuyler v. Bradt*, 2 Caines' Cas. (N. Y.) 335.

Where the plaintiff, before the commencement of the suit, demanded the possession, and defendant, who occupied the whole premises, answered that she desired to pay the judgment on which plaintiff had acquired title, and did not wish to give up the premises, it was held not to be an ouster or denial of plaintiff's rights. *Avery v. Hall*, 50 Vt. 11.

Where the defendant admitted his possession, and in answer to a demand for it said that, "it would be hard to pay for the land twice," it was held not to amount to "an unequivocal denial of the defendant's title," and not to be evidence of an ouster. *Colburn v. Mason*, 35 Me. 434.

In New York the defendant can not put the plaintiff to proof of actual ouster, by merely proving that others are entitled in common with him. He is required to show that he is himself such tenant with the plaintiff. *Gillett v. Stanley*, 1 Hill (N. Y.), 121.

So, though the plaintiff declares only for an undivided portion of the premises; for, the presumption is, the defendant being in possession, that he claims the whole in hostility to the plaintiff. *Sharp v. Ingraham*, 4 Hill (N. Y.) 116.

One tenant in common may oust his co-tenant and hold in severalty. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession." *M'Clung v. Ross*, 5 Wheat. (U. S.) 124.

In ejectment by one tenant in common against another, it is a sufficient denial by the defendant of the plaintiff's right, that the defendant claims the whole premises as his own, that he has offered to sell the same, and declares that the plaintiff would be compelled in equity to execute a deed given by his brothers and sisters as heirs of their father, in compliance with a contract made with the grantor of the defendant. *Valentine v. Northrop*, 12 Wend. (N. Y.) 494.

§ 7. Ejectment Between the Owners of Joint Estates—The Law Stated by Adams.—It is a maxim of the common law, that the possession of one joint tenant, parcener, or tenant in common, is *prima facie* the possession of his companion also. And it therefore follows that the possession of one joint tenant can never be considered by the common law as adverse to

the title of the other, unless it be attended by circumstances demonstrative of an adverse intent; or, in other words, whenever one joint tenant, parcener, or tenant in common is in possession, his fellow is, in contemplation of the common law, in possession also, and it is necessary, in order to enable his companion to maintain ejectment, to rebut this presumption by proof of an actual ouster.¹

§ 8. **The Relations of Joint Owners, etc.**—The relation of co-tenants and joint tenants among themselves are never presumed to be hostile, and the acts of one in relation to the common property is in law presumed to be for the common benefit of his companions in the estate. It will not be presumed that a co-tenant or joint tenant intended to act otherwise, if his acts will admit of any other construction.²

Tenants in common sustain to each other a relation of trust. *Harrison v. Harrison*, 56 Miss. 174.

§ 9. **The Possession of One Tenant Presumed to be the Possession of All.**—The possession of a co-tenant, joint tenant or co-parcener can never be considered by the common law rules as adverse to the title of his companion in estate, unless such possession is accompanied by circumstances clearly showing an adverse intent. When the tenant is in possession, his companion in the estate is also, by the rules of the common law, presumed to be in possession, and the burden is upon the plaintiff in ejectment when suing as a co-tenant, joint tenant or co-parcener to rebut this presumption by proof showing an actual ouster.³

The seizin and possession of one tenant in common of real estate, is seizin and possession for the use of the others. *Kinney v. Slattery*, 51 Iowa, 353.

¹ *Adams on Ejectment*, 136; *Doe v. 71 Mo. 94*; *Blakeney v. Ferguson*, 20 *Keen*, 7 T. R. 386; *Ford v. Gray*, Ark. 547; *Clymer v. Dawkins*, 3 How. Salk. 285; *Smales v. Dale*, Hob. 120; (U. S.) 674; *Coleman v. Clements*, Jones v. Weathersbee, 4 Strobh. (N. 23 Calif. 245; *Bowen v. Preston*, 48 C.) L. 50. Ind. 367; *Abercrombie v. Baldwin*,

² *Baker v. Whiting*, 3 Sumn. (U. S.) 475; *Woods v. Philipps*, 43 N. Y. 152; *Faulke v. Bond*, 12 Vroom (N. J.) 527; *Berthold v. Fox*, 13 Minn. 507. 15 Ala. 363; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Shumway v. Holbrook*, 1 Pick. (Mass.) 114; *Strong v. Cotter*, 13 Minn. 82; *Long v. McDow*, 87 Mo. 197; *Bailey v. Trammell*, 27 Tex. 317; *Buckmaster v. Needham*, 22 Vt. 617.

³ *Taylor v. Cox*, 2 B. Mon. (Ky.) 429; *Lindley v. Groff*, 37 Minn. 338; 34 N. W. Rep. 26; *Davis v. Givens*,

The possession of tenants in common is one and undivided; neither can one alone support an action of trespass. The possession of one, therefore, is the possession of all, and if one enters generally, without saying for whom, it will be implied, that he enters according to law; that is to say, for himself and the others. *Smales v. Dale*, Hob. 120; *Moore*, 868; 14 Vin. 512, P. a. pl. 1; *Corothers v. Lessee of Dunning*, 3 Serg. & R. (Penn.) 381.

The relations of tenants in common are presumed to be amicable rather than hostile, and the acts of one co-tenant affecting the common property are presumed to be for the common benefit. *Foulke v. Bond*, 12 Vroom, (N. J.) 527.

The possession of one co-tenant is the possession of the others and is in trust for their benefit. But such possession may become adverse and may be shown to be such by acts or declarations which repel the presumption that the possession is in the character of a co-tenant. *Alexander v. Kennedy*, 19 Tex. 488.

One tenant in common is justified in taking peaceable possession of the common property, and even though such possession is acquired by stealth it is legal, as against a co-tenant claiming the sole possession, if accomplished without tumult or breach of the peace. *Wood v. Phillips*, 43 N. Y. 152.

§ 10. A Co-tenant Acts for the Benefit of All.—The possession of one tenant in common is the possession of all the co-tenants. It is a general rule of law that all acts done by a co-tenant relating to or affecting the common property are presumed to have been done for the common benefit of all the co-tenants. And where there is proof of prior possession by the grantors of a plaintiff claiming to be the owners of the fee, it is a well-settled rule of law, in an action of ejectment, that such proof of prior possession under claim of ownership is *prima facie* evidence of ownership and seizin, and is sufficient to authorize a recovery unless the party defendant shall show a better title.¹

One co-tenant will not be presumed to intend a wrong to his companion, if his acts will admit of any other construction. *Berthold v. Fox*, 13 Minn. 507.

The possession of one tenant in common *eo nomine*, as tenant in common can not bar his companion, such possession being not adverse to, but in support of the common title. *Kathan v. Rockwell*, 16 Hun (N. Y.), 90; *Jackson v. Tibbetts*, 9 Cow. (N. Y.) 241.

When one tenant in common removes an incumbrance from the common property, or acquires the legal title when the same is outstanding,

¹ *Benfield v. Albert*, 132 Ill. 671 *Lloyd v. Lynch*, 28 Pa. St. 419; *Thurston v. Masterson*, 7 Dana (Ky.) 288; 108 Ill. 599; *Barger v. Hobbs*, 67 Ill. *Brittin v. Handy*, 20 Ark. 381. 592; *Page v. Webster*, 8 Mich. 263;

such acquisition inures to the benefit of all the persons interested in such common property. *Dray v. Dray (Or.)*, 27 Pac. Rep. 223; Am. Dig. 1891, 4252.

When one tenant in common induces a co-tenant to deed to him his interest in the common property, which had been sold under an execution under the promise that such tenant will redeem such common property for the benefit of all the tenants in common, and then permits the time for redemption to expire, and on the next day takes a deed in his own name from the execution purchaser, such deed is constructively fraudulent, and the title thus acquired inures in equity to the benefit of all such tenants in common. *Dray v. Dray (Or.)*, 27 Pac. Rep. 223; Am. Dig. 1891, 4252.

When one of several co-tenants acquires an outstanding title before he has claimed to hold adversely to his co-tenants, he will take for the benefit of all the co-tenants, subject to their liability to contribute to the costs. *Burgett v. Taliaferro*, 118 Ill. 503; 9 N. E. Rep. 334; *Picot v. Page*, 26 Mo. 348.

If one co-tenant redeems the property from a tax sale, the redemption inures to the benefit of all. *Miner v. Durham*, 13 Oreg. 470; *Lomax v. Gindele*, 117 Ill. 527.

So when he buys in the land at a tax sale. *Weare v. Van Meter*, 42 Iowa, 128.

And so when he covertly arranges with the holder of the certificate to take out a deed and then convey to him. *Lomax v. Gindele*, 117 Ill. 527.

§ 11. **When the Right of Action Accrues—Notice of Acts Constituting the Ouster.**—The right of action accrues at the instant the possession becomes adverse, for then, and not until then, is the ouster complete. To constitute an adverse possession of one tenant in common against his co-tenant, there must be some notorious act asserting an entire ownership. It is held in some cases that this act must be brought home to the knowledge of the co-tenant, but this depends on the nature of the act. If it consists altogether of a mere verbal assertion of entire ownership, such an assertion could not, with any propriety, be regarded as an act of adverse possession, of which the co-tenant was bound to take notice as made to him or communicated to him.¹

A trustee may disavow and disclaim his trust; a tenant, the title of his landlord after the expiration of his lease; a vendee, the title of his vendor after breach of the contract; and a tenant in common, the title of his co-tenant; and drive the respective owners and claimants to their action of ejectment within the period of the statute of limitations. The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced, is

¹ *Warfield v. Lindell*, 30 Mo. 272.

in the degree of proof required to establish the adverse character of the possession. Where possession is originally taken and held in subserviency to the title of the real owner, a clear, positive and continued disclaimer and disavowal of the title, and assertion of an adverse right, to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute. Otherwise, the grossest injustice might be practiced; for, without such notice, he might well rely upon the fiduciary relations under which the possession was originally taken and held and upon the subordinate character of the possession as the legal result of those relations.¹

A tenant in common has the right to assume that the possession of his co-tenant is his possession until informed to the contrary, either by express notice or by acts and declarations which may be equivalent to notice. *Aguire v. Alexander*, 58 Calif. 21.

Where a person entered upon land owned by tenants in common by license of one of them and erected and occupied a building thereon, he must be held as holding in submission to their title until the contrary is shown. *Buckman v. Buckman*, 30 Me. 494.

§ 12. **Nature of the Ouster Between Co-tenants and Joint Tenants.**—The ouster in the case of co-tenants or tenants in common differs from an ouster in other cases only in the degree of proof required to establish it. The acts of a co-tenant which might, were it not for the particular relation he bears to his companion in the estate, be construed as asserting a hostile or adverse possession, may be held as consistent with a recognition of the right of his companion. What might amount to an ouster in ordinary cases is not necessarily so in cases where the relation of co-tenancy or joint tenancy exists between the proprietors of the estate.²

There can be no legal doubt that one tenant in common may disseize another. The only difference between that and other cases is, that acts which, if done by a stranger, would, *per se*, be a disseizin, are, in the case of tenancies in common, susceptible of explanation, consistently with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseizin. It depends upon the intent with which they are done, and their notoriety. The law will not presume that one tenant in common intends to oust another. The fact must be notorious, and the intent must be established in proof. *Prescott v. Nevers*, 4 Mason (U. S.), 330.

As against a co-tenant an ouster can not be proved merely by acts which are consistent with an honest intent to acknowledge and conform to the

¹ *Zeller v. Eckert*, 4 How. (U. S.) *Faulke v. Bond*, 12 Vroom (N. J.), 289. 527.

² *Newell v. Woodruff*, 30 Conn. 492;

rights of his co-tenant although such acts might be sufficient evidence of an ouster between them, if no tenancy in common existed and each claimed the whole estate. *Newell v. Woodruff*, 30 Conn. 492.

One tenant in common may oust his co-tenant and hold in severalty. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession. *M'Clung v. Ross*, 5 Wheat. (U. S.) 124; *Cuyler v. Bradt*, 2 Caines' Cas. (N. Y.) 325; *Clark v. Vaughan*, 3 Conn. 191; *Leonard v. Leonard*, 10 Mass. 283.

In Vermont, acts of possession constituting the ouster must be not only inconsistent with, but exclusive of the continuing rights of the plaintiff, such as would amount to an ouster between landlord and tenant. *Chandler v. Ricker*, 49 Vt. 128.

Where the evidence showed that the defendant leased the property, spoke of it as her own, paid the taxes, and that no one had, to her knowledge, set up a title or claimed any right to it, except the plaintiff, and he had never stated the nature of his claim, and had not demanded possession of a specific interest as co-tenant, the court below granted a non-suit, and this was on appeal affirmed. *Newell v. Woodruff*, 30 Conn. 492.

§ 13. **The Law Stated by Stearns.**—The possession or entry of one tenant in common or joint tenant is always presumed to be in maintenance of the right of all; and he shall not be presumed to intend a wrong to his companions if his acts will admit of any other construction. The mere pernancy of the profits by one, shall not be considered of itself as an ouster. If there are several tenants in common, who are co-heirs, the entry of one will not be deemed adverse to the title of the others, without the strongest evidence of exclusive claim of title to the whole estate. But one heir may disseize his co-heirs, and hold in adverse possession against them as well as against a stranger. An ouster or disseizin is not generally to be presumed, from the mere fact of sole possession. But it may be proved by such possession, if accompanied with a notorious claim of exclusive right to the property in question. If one tenant in common enters into the actual and exclusive possession of the lands, taking the whole rents and profits to his own use, and openly asserting his own exclusive property in the lands, denying the title of any other person, it is an adverse possession by him and those claiming under him, and an ouster of the other tenants. So, if one tenant in common enters into the whole estate, under a deed duly acknowledged and registered, from one who has no title, it is an actual disseizin of his companions.¹

¹ Stearns on Real Actions, 41, Sec. Rice, 5 Mass. 344; *Shumway v. Holbrook*, 16, citing 2 Prest. Abst. 291; *Higbee v. Brook*, 1 Pick. (Mass.) 114; *Ricard v.*

§ 14. **Ouster—The Burden of Proof.**—The law never assumes that a tenant in common or joint tenant is disloyal to the rights and interests of his companions in the estate, and as acts amounting to an ouster or disseizin are in the highest sense of the term disloyal to such rights and interests, the burden of proving their existence is of course cast upon the person making the allegation of them.¹

§ 15. **Ouster—Questions of Law and Fact.**—The existence of the facts relied upon to constitute an ouster is a question purely of fact for the determination of a jury, but the question as to whether the facts in a given case constitute a legal ouster is a question of law for the court, and the court will usually instruct the jury that if they find a certain state of facts to exist they may presume from such facts an ouster and an adverse possession.²

§ 16. **The Ouster Admitted.**—An ouster may be and very frequently is admitted by the pleadings. Where a defendant in his plea or answer sets up the defense of adverse possession, his plea or answers to it will be treated as a confession of the ouster and render the proof thereof unnecessary on the trial.³ So where a defendant denies the title of the plaintiff and his right of entry, or pleads not guilty and claims the exclusive possession and the like, the ouster is admitted.⁴

In many States these matters are regulated by statute. In Illinois R. S. 1889, c. 45 :

§ 19. The defendant may demur to the declaration as in personal actions, or he shall plead the general issue, which shall be, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration; and the filing of such plea or demurrer shall be deemed an appearance in the cause, and upon such plea the defendant may give in evidence any matter that may tend to defeat the plaintiff's action, except as hereinafter provided.

Williams, 7 Wheat. (U. S.) 120; Clark v. Crego, 47 Barb. (N. Y.) 599; Williams v. Gray, 3 Greenl. (Me.) 207; Doe v. Prosser, Cowp. 217; Taylor v. Cummins v. Wyman, 10 Mass. 464; Hill, 10 Leigh (Va.), 457. Prescott v. Never, 4 Mason (U. S.), 326. ³ Classon v. Rankin, 1 Duer (N.

¹ Van Sibber v. Frazier, 17 Md. 436; Newell v. Woodruff, 30 Conn. 492.

² Cummins v. Wyman, 10 Mass. 468 (1813); see also Harmon v. James, 7 S. & M. (Miss.) 111; Blackmore v. Gregg, 2 W. & S. (Penn.) 182; Carpentier v. Mendenhall, 28 Calif. 484;

⁴ Miller v. Myers, 46 Calif. 535; Greer v. Tripp, 56 Calif. 209; Clason v. Rankin, 1 Duer (N. Y.), 337; McCallum v. Boswell, 15 U. C. Q. B. 343; Harrison v. Taylor, 33 Mo. 211; Noble v. McFarland, 51 Ill. 226; Peterson v. Laik, 24 Mo. 541.

§ 21. The plea of not guilty shall not put in issue the possession of the premises by the defendant, or that he claims title or interest in the premises.

§ 22. It shall not be necessary for the plaintiff to prove that the defendant was in possession of the premises, or claims title or interest therein at the time of bringing suit, or that the plaintiff demanded the possession of the premises, unless the defendant shall deny that he was in possession or claims title or interest therein, or that demand of possession was made, by special plea, verified by affidavit. R. S. Ill. 1889, Chapter 45, Secs. 19, 21, 22.

One who defends on the merits in ejectment by his co-tenant, and denies his title, can not object that there was no ouster nor demand of possession before action. *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448; 7 So. Rep. 760; Am. Dig. 1890, 1193.

In an action for the recovery of land brought against a co-tenant in common, the denial in the answer of all right, title and interest of the plaintiff in the land involved in the action, is a confession of ouster, and will entitle the plaintiff to recover. *Clason v. Rankin*, 1 Duer (N. Y.), 337.

§ 17. **When an Ouster Will Be Presumed.**—Upon the question of when an ouster will be presumed there is great confusion among the authorities. A reasonable rule would seem to be that where it is shown by the evidence that the defendant has been in the adverse possession of the lands in controversy for a long period of time, an ouster will be presumed and need not be otherwise proved,¹ but the period of time during which the possession has been thus held must, of course, be less than the period fixed by the statute of limitations. The defense of adverse possession admits the ouster, and justifies it by insisting that the right to assert it has ceased to exist.²

The following cases appear to hold the contrary doctrine: *Northrop v. Wright*, 24 Wend. (N. Y.) 221; *Flock v. Wyatt*, 49 Iowa, 466; *Warfield v. Lindell*, 30 Mo. 272; *Linker v. Benson*, 67 N. C. 150. Possession of twenty-seven years by one tenant in common, although during all that time the right of the co-tenant had not been recognized, was held not to be sufficient to authorize a jury to presume an ouster, where before twenty-five years had elapsed, the co-tenant had made an actual entry upon the land and was forcibly expelled. *Northrop v. Wright*, 24 Wend. (N. Y.) 221 (1840).

In North Carolina, an ouster by one tenant in common will not be presumed upon evidence of an exclusive use of the common property and appropriation to himself of its profits, unless such use and appropriation have continued for a period of twenty years. *Caldwell v. Neely*, 81 N. C. 144.

But possession of twenty-seven years by one tenant in common, although during all that time the right of the co-tenant had not been recognized, was not held sufficient to authorize a jury to presume an ouster in a case in which, before twenty-five years had elapsed, the co-tenant had made an

¹ *Doe v. Dresser*, Cowp. 217; *Jack-* Y.) 84; *Johnson v. Taulmin*, 18 Ala. son v. Whitbeck, 6 Cow. (N. Y.) 632; 50; *McCall v. Webb*, 88 Pa. St. 150. *Van Dyck v. Van Buren*, 1 Cai. (N. ² *Campau v. Dubois*, 39 Mich. 274.

actual entry upon the land and was forcibly expelled. *Northrop v. Wright*, 24 Wend. (N. Y.) 221.

Where defendant, in response to a demand for possession, said the demandant "could obtain it by law," this was held to justify a finding of an ouster. *Gordon v. Pearson*, 1 Mass. 323.

§ 18. Sale of the Entire Estate by a Tenant in Common.—Where one of several tenants in common, or joint tenants, sells, and by his deed of conveyance purports to convey the whole of the estate, an entry made under such conveyance by the grantee, or those holding under him, is a complete ouster or disseizin of the other tenants in common,¹ or joint tenants.²

Where one of several tenants in common conveys by a full warranty deed a certain portion of the land by metes and bounds, such portion representing the amount of her interest in the entire tract, it will have the effect of conveying her entire undivided interest. *Young v. Edwards*, 33 S. C. 404; 11 S. E. Rep. 1066 (1890).

In California, it has been held that an entry under a deed which purported to convey the entire title, followed by exclusive possession, and a belief that the whole estate was conveyed, when in fact the grantor had but an undivided interest, does not amount to ouster upon which an action of ejectment can be maintained. *Seaton v. Son*, 32 Calif. 481.

The evidence to establish an ouster must be such as would show an adverse possession in a wrongdoer. *Edwards v. Bishop*, 4 N. Y. 61.

A mere occupancy, unaccompanied by acts hostile to the possession of the plaintiff, without something to manifest an intention to exclude him, will not amount to an ouster. *McClung v. Ross*, 5 Wheat. 116 (1808); *Crallefaux v. Durham*, 8 Wis. 288; *Abercrombie v. Baldwin*, 15 Ala. 363; *Whiting v. Drury*, 15 Pick. (Mass.) 428; *Colburn v. Mason*, 25 Me. 434; *Chandler v. Ricker*, 49 Vt. 128; *Squires v. Clark*, 17 Kan. 84.

§ 19. A Distinction Between Tenants in Common and Joint Tenants.—What has been said in relation to the duties and corresponding rights of tenants in common and joint tenants seems to apply with more force to the relation of joint tenants

¹ *Bradstreet v. Huntington*, 5 Pet. 527; *Horne v. Howell*, 46 Ga. 9; *Kinney v. Slaterry*, 51 Iowa, 353; *Gerry v. How*, (U. S.) 674; *Prescott v. Nevers*, 4 Mason (U. S.), 326; *Clark v. Vaughan*, 3 Conn. 191; *Long v. Stapp*, 49 Mo. 506; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 186; *Gray v. Bates*, 3 Strobb. (S. C.) Law, 498; *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530; *Hinkley v. Greene*, 52 Ill. 230; *Parker v. Prop'rs, etc.*, 3 Met. (Mass.) 101; *Kittredge v. Locks, etc.*, 17 Pick. (Mass.) 246; *Cain v. Furlow*, 47 Ga. 674; *Foulke v. Bond*, 12 Vroom (N. J.), 436.

² *Caldwell v. Neely*, 81 N. C. 114; *Day v. Howard*, 73 N. C. 1; *Larman v. Huey's heirs*, 13 B. Mon. (Ky.) 436.

than to tenants in common. This distinction of the law, if a distinction it really is, is probably owing to the fact that an estate of joint tenancy is one of complete mutuality; the shares and interests of the tenants are all equal and uniform. We have seen that in this estate there is a unity of interest, time, title and possession, while in an estate in common there is only a unity of possession.¹ Tenants in common may hold by several and distinct titles always, and by a unity of possession, for none of them know their own severalty and all occupy promiscuously; one tenant in common may hold his part in fee simple and another for life and so on. So that there is no unity of interest. One may hold by descent and another by purchase, or both by purchase from different grantors, so there is no unity of title. The estate of one may have been vested for fifty years and the other but a day or a month, so there is no unity of time.²

It has been held that this rule of mutual trust and obligation between the owners of joint estates applies to tenants in common only when they derive their title from the same source, or when they enter into obligations with each other, and not when they acquire different and unconnected interests in the estate by distinct purchases although under the same title.³

Ship owners are tenants in common of the vessel and not joint tenants or partners, and the share of one owner is subject to a general balance of accounts between the owners. *Nicoll v. Munford*, 4 Johns. (N. Y.) 522; *Knox v. Campbell*, 1 Pa. St. 366; *French v. Price*, 24 Pick. (Mass.) 13.

§ 20. **A Rule Stated by Chief Justice Shaw.**—Tenants in common of a vessel, who are not engaged jointly in the employment of purchasing or building ships for sale, do not stand in such a relation of mutual trust and confidence toward each other, in respect of the sale of such vessel, that each is bound, in his dealings with the other, to communicate all the information of facts within his knowledge, which may affect the price or value. A different rule may prevail, in respect to any contract for the use or employment of the common property, in which relation perhaps they may be deemed to place confidence mutually in each other. But as in common cases of

¹ 2 Blackstone's Com. 180.

W. (Penn.) 439; *Roberts v. Thorn*, 25

² *Ewell's Essentials of the Law*, 179; Tex. 728; *Rippitoe v. Dwyer*, 49 Tex.

2 Blackstone's Com. 192.

498; *Frentz v. Klotsch*, 28 Wis. 312;

³ *Matthews v. Bliss*, 22 Pick. (Mass.)

Brittin v. Handy, 20 Ark. 281.

48 (1839); *Smiley v. Dixon*, 1 P. &

tenants in common of a vessel, they are independent of each other in all matters of purchase and sale, and may deal with each other in the same manner as owners of separate property, and each may act upon the knowledge he has without communicating it.¹

§ 21. **Survivorship in Joint Tenancy.**—The doctrine or right of survivorship among joint tenants as it existed under the common law is not in harmony with the policy of the American law. It was never favored in courts of equity and in most of the States it has been abolished.² It may be created, however, by will or deed.³

The doctrine of survivorship is stated by Mr. Bowlby in *American and English Law Encyclopædia* as follows: "Where two or more persons have an estate in joint tenancy in any subject of property, each having a concurrent interest and title in and to the whole, and each being in possession of the whole, if one or more of them dies the entire tenancy remains to the survivor or survivors, and he is or they are entitled to the whole estate."⁴

The doctrine of survivorship has no application to tenants in common.⁵

The right of survivorship among joint tenants has been abolished (except as to estates held in trust) in Pennsylvania, New York, Kentucky, Virginia, Indiana, Missouri, Tennessee, Alabama, Georgia, North Carolina, South Carolina and some other States. In Connecticut it never existed. 11 Am. & Eng. Ency. 1077; 2 Bouvier Law Dic. 566; 1 Washburn Real Prop. 408.

A conveyance of land in 1854 in trust for the grantor's wife and her two children, vested in each an undivided one-third of the equitable estate without right of survivorship, which was abolished by Act Miss. 1823 (Hutch. Code, p. 614, § 12), that act not containing the exception as to conveyances in trust found in Rev. Code Miss. 1857, p. 309, art. 18. Day v. Davis, 64 Miss. 253; 8 So. Rep. 203 (1890).

How. St. Mich. § 7882, providing for the partition of lands held in common, declares that, if any portion of the lands can be divided without

¹Matthews v. Bliss, 22 Pick. (Mass.) Cable, 114 Pa. St. 586; 7 Atl. Rep. 48 (1839). This rule of law applies 791 (1887); Weir v. Tate, 4 Ired. equally well to tenants in common of (N. C.) Eq. 264.

²Jones v. Cable, 114 Pa. St. 586; 7 Atl. Rep. 791 (1887).

³11 Am. & Eng. Ency. 1077; see Blackstone's Com. (Chase's Ed.) 183.

⁴Miles v. Fisher, 10 Ohio, 1; Phelps 5 Blackstone's Com. (Chase's Ed.) 194.
v. Jepson, 1 Root (Conn.), 48; Nichols v. Denny, 37 Miss. 59; Jones v.

great prejudice to the owners, it must be partitioned, and only those portions sold which can not be divided. Section 7942 provides that, if a tenant in common commit waste on the common land, he shall be subject to an action on the case: *Held*, that a tenant in common in lands can not convey his interest in the timber thereon, and thereby make the other tenants in common co-tenants with his grantee, so that the latter could bring partition for the timber, but that the only interest which such purchaser takes is the interest in the timber on such lands as in partition proceedings shall be set off to his grantor. *Benedict v. Torrent*, 83 Mich. 181; 47 N. W. Rep. 129 (1891).

Rev. St. Ill. c. 30, § 5, provides that no estate in joint tenancy shall be held or claimed under any conveyance, unless the land conveyed shall be expressly declared to pass, not in tenancy in common, but in joint tenancy. Rev. St. Ill. c. 76, § 1, provides that, if partition be not made between joint tenants, the shares of those who die first shall not accrue to the survivor, but shall be considered, to every intent and purpose, as if such joint tenants had been tenants in common: *Held* that, even where a deed to two persons states that the land is conveyed to them "not as tenants in common, but as joint tenants," there is no right of survivorship. *Magruder, C. J.*, dissenting. *Mette v. Feltgen* (Ill.), 27 N. E. Rep. 911 (1891).

§ 22. **Tenants of the Entirety—Husband and Wife at Common Law.**—The common law doctrine is: If an estate be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law, they can not take the estate by moieties, but both are seized of the entirety *per tout et non per my*, the consequence of which is, that neither husband nor wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.¹ So, where land is held by husband and wife as tenants by the entirety, as at the common law, the sale of the same on execution against the husband, followed by a sheriff's deed, will fail to pass any title whatever. It will not pass the undivided half, as in the case of the sale of the interest of one of two tenants in common.²

In 1855 a conveyance of land was made to H. J., N. J., his wife, and M. A. J., his daughter, under which H. J., as the head of the family, took possession: *Held*, that the husband and his wife became seized of an undi-

¹ 2 Blackstone's Com. 182; Almond v. Bonnell, 76 Ill. 536 (1875); Lux v. Hoff, 47 Ill. 425; Jackson v. McConnell, 19 Wend. (N. Y.) 175; Jackson v. Stevens, 16 Johns. (N. Y.) 115. *berger*, 3 Ham. (O.) 305; Whittlesey v. Fuller, 11 Conn. 337.

² Almond v. Bonnell, 76 Ill. 536 (1875); Rogers v. Grider, 1 Dana (Ky.), 242; Roanes v. Archer, 4 Leigh (Va.), 550; see Barber v. Harris, 15 Wend. (N. Y.) 615.

The rule seems to be the same in all the States excepting Ohio and Connecticut. *Sergeant v. Stein-*

vided half thereof, as tenants by the entirety, and the daughter of the other half as a tenant in common, and that upon the death of the husband the wife continued to hold the same interest which the two, as one person, had held before. *Park Commissioners v. Coleman*, 108 Ill. 591 (1884). This law has been changed by statute in Illinois.

§ 23. **Joinder of Tenants in Common as Plaintiffs.**—In those States where the old action of ejectment has been abolished, it may be doubted whether tenants in common can unite in a real action, inasmuch as their title and their interest are several. The new codes of procedure usually provide that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. This is the rule that prevailed in equity proceedings, but it is by the codes made general, and applies as well to actions at law as in equity. Notwithstanding the title of tenants in common is several, they have an interest in the subject of the action—that is, in the property in respect to which the action is brought, and in obtaining the relief demanded provided the disposition applies to all. If the occupant holds adversely to all the tenants in common, and they all join to recover possession, the pleading should show the interest of each, that the judgment may conform to it. Parties are not required to join as plaintiffs unless they are united in interest—that is, have a joint interest, and consequently tenants in common may sue severally, each for his own interest. It would seem, however, in the absence of statutory authority, that they must all join for the whole tract, or each sue for his individual interest.¹

§ 24. **Extent of the Recovery.**—While, perhaps, a considerable majority of the reported cases, involving the questions of the extent of the recovery of one of several tenants in common, in actions for the recovery of the possession of real property, hold, that one tenant in common may recover the possession of the whole estate in an action of ejectment brought against a stranger to the common title, yet there are many very respectable authorities to the contrary.² At common law tenants in common could not join in an action of ejectment.³ The

¹*Mattis v. Boggs*, 19 Neb. 698; 28 N. W. Rep. 825 (1886); *Bliss on Code Pleading*, title, Parties; *Kirk v. Bowling*, 20 Neb. 260; 29 N. W. Rep. 928 (1886); see *Crook v. Vandevort*, 13 Neb. 505; 14 N. W. Rep. 470.

²*Mattis v. Boggs* (Neb.), 25 N. W. Rep. 616 (1885); *Dewey v. Brown*, 2 Pick. (Mass.) 387; *Dawson v. Mills*, 32 Pa. St. 302; *Gray v. Givens*, 26 Mo. 291.

³*Freeman on Co-tenancy*, § 341.

reason usually given for this rule of the common law is, that the title of each co-tenant is separate and distinct and hence a joint action will not lie thereon. This rule has been changed in many States by statute, but in those States having no statute upon the subject, it seems that the common law rule must prevail. If, by the common law, tenants in common, present and co-operating, can not maintain a joint action of ejectment for the possession of the premises owned by them jointly, how is it that one of them suing alone can recover the whole of the joint premises as against a stranger, the judgment having the effect of a joint recovery. It seems illogical to say that it can. The better rule seems to be that the recovery of a joint tenant in the absence of statutory enactments to the contrary, must be limited to his right or interest in the premises. For it might well be that the other tenants in common may prefer the person in actual possession of the premises to the person seeking to recover it from him.¹

Proof of title in A and B, and a conveyance from B to C, and a deed of trust from C to D, and his death, leaving the plaintiffs his only heirs, will not sustain a judgment in ejectment in favor of the plaintiffs for the entire interest in the land. At most, such evidence shows a right of recovery only of the undivided half of the land. *Strean v. Lloyd*, 128 Ill. 495 (1889).

§ 25. **A Contrary Doctrine.**—A tenant in common as against every person but his co-tenants is entitled to the possession of the entire tract held in common, and may maintain ejectment therefor against a stranger to the common title.²

§ 26. **A Co-tenant's Right to Purchase an Outstanding Title.**—It is a well settled rule of law that one tenant in common or joint tenant can not purchase an outstanding title or incumbrance and assert it against his companions in the estate without first affording them an ample opportunity of reimbursing him for his expenditure.³ The rule requires tenants who desire to participate in the benefits accruing from

¹ *Brown v. Dewey*, 2 Pick. (Mass.) 387; *Bracken v. Cooper*, 80 Ill. 221; *Smith v. Osborne*, 86 Ill. 606; *Wilton v. Tazewell*, 86 Ill. 29; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230; *Venable v. Beauchamp*, 3 Dana (Ky.); *Brown v. Horman*, 1 Neb. 448; *Boskowitz v. Davis*, 12 Nev. 446; *Van Horn v. Fonda*, 5 Johns. Ch. (N. Y.) 389, 407; *Rothwell v. Dewees*, 2 Black (U. S.) 613; *Britton v. Handy*, 20 Ark. 381; 596; *Picot v. Page*, 26 Mo. 421.

² *Sherin v. Larson*, 28 Minn. 523; 11 N. W. Rep. 70 (1881); *Hart v. Robinson*, 21 Calif. 346; *Robinson v. Roberts*, 31 Conn. 145; *Hibbard v. Foster*, 24 Vt. 542.

³ *Flogg v. Mann*, 2 Sumn. (U. S.) 486; *Rothwell v. Dewees*, 2 Black (U. S.) 613; *Britton v. Handy*, 20 Ark. 381; 596; *Picot v. Page*, 26 Mo. 421.

the purchase of an outstanding title to make the necessary reimbursement within a reasonable time, or they will be deemed to have repudiated the transaction.¹ As the general presumption of the law is, as we have seen, that these tenants hold the estate for the joint and mutual benefit of all, one of them will not be permitted to purchase an outstanding title for his individual benefit.²

In trespass to try title by a co-tenant against one claiming adversely under a tax deed, it is immaterial that the portion owned by the co-tenant is identified in his conveyance by a particular description. As co-tenant, he could recover the entire tract. *McDonald v. Hamblen*, 78 Tex. 628; 14 S. W. Rep. 1042 (1891).

In trespass to try title, part of the tenants in common of a tract of land may recover the whole tract against a mere trespasser. *Harber v. Dyches* (Tex.), 14 S. W. Rep. 580; Am. Dig. 1891, 4255.

§ 27. **The Doctrine Stated by Chancellor Kent.**—It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties as joint devisees, created. Community of interest produces a community of duty, and there is no real difference on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title to disseize and expel his co-tenant.³

Though a tenant in common can not buy an outstanding paramount title so as to oust his co-tenant, yet there is no reason why he may not buy in the independent interest of another tenant in common similarly situated. *Snell v. Harrison* (Mo.), 16 S. W. Rep. 152; Am. Dig. 1891, 4252.

Where defendant is in possession under a deed making him tenant in common with the plaintiff, he can not set up an outstanding title to defeat the action. *Baintree v. Battles*, 6 Vt. 395; *Boskowitz v. Davis*, 12 Nev. 446; see *Paige v. Branch*, 97 N. C. 97; 1 S. E. Rep. 625.

Where complainants, by their bill in ejectment, claimed and sued for all the lands embraced within the calls of a grant to them, and defendants

¹ *Mandeville v. Solomon*, 39 Calif. 125.

² *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 389.

³ *Knolls v. Barnhart*, 71 N. Y. 474; *Duff v. Willson*, 72 Pa. St. 442.

proved the existence of older outstanding titles to certain parts thereof, complainants are not estopped from claiming that the effect of such evidence was to exclude the lands covered by such paramount title from the operation of complainant's grant. *Bleidorn v. Pilot Mountain Coal & Min. Co. (Tenn.)*, 15 S. W. Rep. 737 (1891).

A widow, in possession of lands, as dowress and as guardian in socage of her minor children, is a tenant in common with the other heirs, and will not be permitted to buy in an outstanding title for her individual benefit. *Knolls v. Barnhart*, 71 N. Y. 474.

If tenants in common hold together under a possessory title derived from their ancestor, a part of them can not assert a subsequently acquired title against the others, except by ejectment, after first surrendering possession to the others. *Phelon v. Kelley*, 25 Wend. (N. Y.) 389.

§ 28. **Application of the Rule.**—The rule that the purchase of an outstanding title by a tenant in common inures to the benefit of his companions in the estate applies to purchases at judicial sales, including sales for taxes,¹ and to sales of the joint property by the common owners at which one tenant becomes the purchaser,² and to like purchases and sales the same as when an outstanding title is purchased by a tenant in common from some outside source.³ But the rule has not been applied to purchases of the estate after the time for the redemption from tax or other judicial sales has expired, and no redemption has been made as to purchases made after the estate has ceased to be an estate in common from any cause.⁴

Whether possession under a void tax deed is sufficient to authorize trespass against a stranger, it is not sufficient as against a tenant in common, having the legal title to an undivided interest, and hence entitled to possession; *Todd v. Lunt*, 148 Mass. 322; 19 N. E. Rep. 522 (1889).

The acquisition of a tax title by one of the tenants in common, while in possession of the land under an agreement to pay the taxes, inures to the equal benefit of all the co-tenants, and does not divest them of their interests in the land, but does give the tax title claimant a right of contribution against them. *Donnor v. Quartermas*, 90 Ala. 164; 8 So. Rep. 715 (1891).

One tenant in common of a remainder can not, by purchasing the land

¹ *Allen v. Poole*, 54 Miss. 323; *Roundtree v. Denson*, 59 Wis. 522; *Dubois v. Campau*, 24 Mich. 360; *Leslie v. Worthington*, *Wright (O.) Threadgrill v. Redwine*, 97 N. C. 628.

241; *Wilson v. Winslow*, 46 Pa. St. 380; *Carns v. Carns*, 58 Iowa, 747; *Page v. Branch*, 97 N. C. 97; 1 S. E. Moore v. Woodall, 40 Ark. 42; Rep. 625 (1887).

Mothersbaugh v. Burke, 83 Kan. 260; *Butler v. Porter*, 13 Mich. 292; Pa. St. 139; *Alexander v. Sully*, 50 Davis v. King, 87 Pa. St. 261. ³*Reinboth v. Zerbe, etc., Co.*, 29 Iowa, 92.

² *Austin v. Barrett*, 44 Iowa, 488;

when sold for delinquent taxes, cut off the rights of his co-tenants and acquire the exclusive title himself, but he will be deemed a trustee of the title for the equal benefit of all the co-tenants. *Johns v. Johns* (Ala.), 9 So. Rep. 419; Am. Dig. 1891, 4253.

§ 29. **The Rule Not of Universal Application.**—We must bear in mind, however, that the rule of law announced in the preceding section applies only to tenants in common and joint tenants so long as they remain loyal to the joint and mutual interests and rights of their companions in the estate.

When a tenant in common or joint tenant in possession sets up a claim to the entire estate, and notice of such is brought home to his companions in the estate, his possession then becomes adverse, and he may purchase an outstanding title and assert it against his former companions for his own individual benefit.¹

The rule does not apply after the estate of co-tenancy has ceased to exist. So, when the title has been lost by adverse possession, and the co-tenant evicted, one tenant may buy and hold the land for his own individual benefit. *Coleman v. Coleman*, 33 Dana (Ky.), 398.

§ 30. **Where Mortgagees are Tenants in Common.**—Two mortgagees of the same lands holding several mortgages given at the same time to secure several obligations are tenants in common, and their rights are the same as if one mortgagee had been made to both, to secure to each his separate debt.² Each of them may enforce his mortgage by separate suit if necessary to secure his rights.³ By the rules of chancery practice both may join in one suit, and it is usually convenient that they should, in order that the rights of all parties may be determined at once.⁴ Under the statutes of Massachusetts they may join in a common law writ of entry.⁵

§ 31. **Tenants in Common and Joint Tenants—Statutory Provisions.**

(1) COLORADO.

SECTION 275. *Action by tenant in common; proof of actual ouster.* The action may be brought by one or more tenants

¹ *Wright v. Sperry*, 21 Wis. 331. *Palmer v. Carlisle*, 1 Sim. & Stu.

² *Cochran v. Goodell*, 131 Mass. 464 (Eng.) 423; 1 Danl. Ch. Pr. (5th (1881); *Burnett v. Pratt*, 22 Pick. 556; Am. Ed.) 212; *Johnson v. Brown*, 11 Howard v. Chase, 104 Mass. 249. Foster, 405.

³ *Burnett v. Pratt*, 22 Pick. 556; ⁵ Gen. Stats. Mass. c. 134, § 9; *Gilson v. Gilson*, 2 Allen (Mass.), 115. *Cochran v. Goodell*, 131 Mass. 464

⁴ *Noyes v. Barnett*, 57 N. H. 605; (1881).

Lowe v. Morgan, 1 Bro. Ch. 368;

in common against their co-tenants, and in that case the plaintiff shall, in addition to other evidence, be required to prove that the defendant actually ousted such plaintiff, or did some act or acts amounting to a denial of his right as such co-tenant.

Session Laws Colo. 1887, 173.

(2) DAKOTA.

SECTION 5452. *Joinder of defendants having adverse claim.* In an action brought by a person out of possession of real property, to determine an adverse claim or an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises as against the defendants in the action, against whom the judgment has passed.

Sec. 5453. *Joinder of plaintiffs.* Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, co-partners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud on the same.

Compiled Laws Dak. 1887, ch. 29.

(3) GEORGIA.

SECTION 3358. *Joint owner may sue alone.* Any joint tenant, tenant in common, or other person having a part interest in lands or tenements, may have and maintain an action of ejectment or trespass for the recovery of such lands or tenements, or for an injury thereto, without joining with him any other person as plaintiff; but the judgment in such case shall not affect the rights of those interested in such lands or tenements, who are not parties to the suit.

Sec. 3359. *When several claimants can not join.* When several persons claim several parcels of land under distinct titles, and do not sustain to each other the relation of landlord and tenant, a joint action of ejectment can not be maintained against them, nor can a joint or several recovery be had in such action, either for the premises or mesne profits.

Lester, Rowell & Hill's Statutes, 847.

(4) ILLINOIS.

SECTION 5. *Joint tenants, etc.* Any two or more persons claiming the same premises as joint tenants, tenants in common or co-parceners, may join in a suit for the recovery thereof, or any one may sue alone for his share.

R. S. Ill. 1889, 597 Laws, 1872, 370.

(5) INDIANA.

SECTION 1063. *Proof against co-tenant.* In an action by a tenant in common or joint tenant of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that defendant either denied plaintiff's right or did some act amounting to such denial.

R. S. Ind. 1881, Article 38, Ejectment.

When one tenant in common claims under a deed conveying the whole estate, he will be deemed to have ousted his co-tenants. *Nelson v. Davis*, 35 Ind. 474.

A tenant in common may maintain an action for the possession of his part of the real estate, where there is a denial of his right by his co-tenants. *Bethell v. McCool*, 46 Ind. 303.

(6) IOWA.

SECTION 3248. *Joint or tenants in common.* In an action by tenant in common or joint tenant, of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right or did some act amounting to such denial.

2 McClain's Statutes, 857.

(7) KANSAS.

SECTION 597. *By tenant.* In an action by a tenant in common of real property, against a co-tenant, the plaintiff must, in addition to what is required in section five hundred and ninety-five, state, in his petition, that the defendant either denied the plaintiff's right or did some act amounting to such denial.

Gen. Statutes Kansas 1889, 1532.

(8) MAINE.

SECTION 9. *Joinder of demandants.* Persons claiming as tenants in common, joint tenants, or co-parceners, may all, or any two or more, join in a suit for the recovery of lands, or one may sue alone.

R. S. Me. 1883, ch. 104.

(9) MARYLAND.

SECTION 74. In all cases of a joint holding by two or more persons, they may declare whether they hold as joint tenants, in common or in any other manner.

Pub. & Gen. Laws 1888, 1128.

(10) MASSACHUSETTS.

SECTION 7. *Joint tenants, etc., may sue separately or jointly.* Two or more persons claiming the same premises as joint tenants, tenants in common, or co-parceners, may join in a suit for the recovery of such premises, or any one of such persons may sue alone for his share.

G. S. Mass 134, § 9 R. S. 1882, 1018; Webster v. Vandeventer, 6 Gray, 428 (1856); Chandler v. Simrowds, 97 Mass. 508 (1867).

(11) MISSISSIPPI.

SECTION 2506. *Trial of action between co-tenants.* In case such action be brought by some one of several persons, entitled as joint tenants, tenants in common or co-parceners, any joint tenant, tenant in common or co-parcener defending the action, may give notice with his plea, that he defends as such, and admits the right of the plaintiff to an undivided share of the property (stating what share), but denies any actual ouster of him from the property; and upon the trial of such an issue, the additional question of whether an actual ouster has taken place shall be tried, and if it shall appear that the defendant is such joint tenant, tenant in common or co-parcener, with the plaintiff, and no such actual ouster shall be proved, then the plaintiff shall be non-suited with costs; but if it shall be proved, either that the defendant is such joint tenant, tenant in common or co-parcener, or that an actual ouster has taken place, then the jury shall so find by their verdict, and the plaintiff shall have judgment in accordance with the verdict for the recovery of possession and costs.

Rev. Code Miss. 1880, 671.

(12) MISSOURI.

SECTION 4628. *Tenants in common may sue jointly.* Two or more tenants in common may join in the action, and jointly prosecute and sustain such action for the recovery of the estate by them owned in common. (R. S. 1879, S. 2242—c.)

R. S. Mo. 1889, ch. 59.

Sec. 4634. *Id.—As against co-tenant.* If the action is brought by a joint tenant or tenant in common, against his co-tenant, the plaintiff shall also be required to show on the trial that the defendant actually ousted him, or did some act amounting to a total denial of his right as such co-tenant. (R. S. 1879, S. 2248—i.)

Sec. 4635. *One or more joint plaintiffs may recover, etc.* Where there are two or more plaintiffs, any one or more may recover an interest they may be entitled to, in the same manner as if they had brought separate actions, and it shall not be any objection to a recovery in such action that any one or several of the plaintiffs do not prove any interest in the premises claimed, but those entitled shall have judgment, according to their rights, for the whole or such part or portion as they might have recovered if they had brought separate suits. (R. S. 1879, S. 2249.)

R. S. Mo. 1889, ch. 59.

(13) NEBRASKA.

SECTION 628. *Tenants in common.* In an action by a tenant in common of real property, against a co-tenant, the plaintiff must state, in addition to what is required in the first section of this chapter, that the defendant either denies the plaintiff's right, or did some act amounting to such denial.

Compiled Statutes Nebraska, 822.

(14) NEW JERSEY.

SECTION 24. *Joint tenants' action, how prosecuted and defended.* If the action be brought by one of several joint tenants or tenants in common or co-parceners, any tenant or co-parcener defending the action may give notice with his plea that he defends as such and admits the right of the plaintiff to an undivided share of the property (stating what share) but denies an actual ouster of him from the property, which notice shall be copied as a part of the circuit record, and recorded with the pleadings; and upon trial of such issue, the additional question of whether an actual ouster has taken place shall be tried, and if upon the trial of the issue it be proved that defendant is such joint tenant, tenant in common, or co-parcener with the plaintiff, and no actual ouster shall be proved, then the plaintiff shall be non-suited with costs; but if it shall be proved either that the defendant is not such joint tenant, ten-

ant in common or co-parcener, or that an actual ouster has taken place, then the jury shall so find by their verdict, and the plaintiff shall have judgment, in accordance with the verdict, for the recovery of the possession with costs.

R. S. N. J. 1877, title Ejectment, 356.

(15) OHIO.

SECTION 5783. *Petition by tenant in common against co-tenant.* In an action by a tenant in common of real property against a co-tenant, the plaintiff must state, in addition to what is required in section *fifty-seven hundred and eighty-one*, that the defendant either denied the plaintiff's right, or did some act amounting to such denial.

R. S. Ohio 1880, 1396.

(16) OREGON.

SECTION 327. *Action by co-tenant or for dower.* In an action for the recovery of dower before admeasurement, or by a tenant in common of real property against a co-tenant, the plaintiff shall show in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right, or did some act amounting to such denial.

R. S. Oregon, ch. 4, title 1.

(17) PENNSYLVANIA.

SECTION 4. *Joint tenants, etc, may join—Minors may sue by their guardians—Defendant may defend on his own title or that of others.* The writ of ejectment prescribed in the act to which this is a supplement shall issue in all cases where lands, tenants or hereditaments are claimed, and give remedy as fully and effectually as in ejectments in the form heretofore used; and all parties having an undivided interest in any such lands, tenants and hereditaments, whether as joint tenants, co-parceners or tenants in common, may join therein and recover according to their interest and title; and minors may sue by their guardians as in other cases; and the defendant may defend upon his own title or the title of third persons; and the landlord may, as heretofore, be admitted as defendant, and in such case, on the trial, shall admit himself in possession.

1 Brightly's Purdon's Digest, 531.

(18) TEXAS.

SECTION 4791. *May join as defendants, whom.* The plaintiff may join as a defendant with the person in possession, any

other person who, as landlord, remainder-man, reversioner or otherwise, may claim title to the premises or any part thereof, adversely to the plaintiff.

R. S. Texas 1879, 708.

(19) WISCONSIN.

SECTION 3076. *Who joined as defendants.* The plaintiff may join as defendant, any person claiming title to such premises, with any actual occupant thereof, or of some part or parcel thereof, holding as tenant under such person so claiming title or otherwise. If, upon trial, it shall appear that distinct parcels of the premises are occupied by different defendants in severalty, or jointly, and any defendant shall make it appear by affidavit that he has a defense in such action, separate and distinct from that of his co-defendants, the court may award a separate trial as to any of the defendants, as the justice of the case may require; and several judgments may be rendered upon the verdicts in such separate trials, and new trials had as hereinafter provided, according to the rights and interests of the parties; but otherwise the trial may proceed against all the defendants and a joint or separate verdict may be found, and separate judgments may be rendered on such verdicts, according to the rights and interests of the parties.

Sec. 3081. *Judgments against joint possessors.*—If the action be brought against several defendants, and a joint possession of all be proved, the plaintiff shall be entitled to a verdict against all, whether they shall have answered separately or jointly.

R. S. Wis. 1878, ch. 133.

CHAPTER VII.

THE ACTION BETWEEN VENDOR AND VENDEE.

- § 1. Vendor and Vendee.
- 2. Nature of the Relation Discussed.
- 3. To What Cases the Rule Applies.
- 4. Rescission of Contracts—The General Rule.
- 5. The Rescission Must Be in Toto.
- 6. Practice, Mode of Rescission.
- 7. Possession Under Contract of Purchase.
- 8. Capacity in Which the Vendee Holds.
- 9. Estoppel of the Vendee to Deny Title.
- 10. The Law Stated by Mr. Justice Field.
- 11. Notice to Quit, etc.
- 12. The Burden of Proof.
- 13. The Vendor's Remedy, Burden of Proof.
- 14. Repudiation of the Contract by the Vendee.
- 15. Ejectment Against Strangers.
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- 17. Defenses, Where the Vendee Fails to Make His Payments.
- 18. Equitable Titles Adjusted.
- 19. Liquidated Demands Set Off Against Purchase Money.
- 20. Failure of Title in Vendor.
- 21. When the Vendor Has Parted with His Title.
- 22. Eviction as a Defense.
- 23. A Forfeiture May Be Waived.

§ 1. **Vendor and Vendee.**—The action of ejectment is frequently resorted to by vendors to recover the possession of real property from persons who have entered into the occupancy of the same under executory contracts of purchase, and who have failed to perform on their part the conditions of the contract.¹ In many States more convenient and expeditious remedies are provided for cases of this kind in the nature of actions of forcible entry and detainer. We quote the statute of Illinois as an illustration. The action of forcible entry and detainer lies * * *

¹Burnett v. Caldwell, 9 Wall. (U. (N. Y.) 260; Suffern v. Townsend, 9 S.) 290; Gaven v. Hagen, 15 Calif. Johns. (N. Y.) 35; Erwin v. Olmsted, 208; Spencer v. Tobey, 22 Barb. 7 Cow. (N. Y.) 229.

“Where a vendee having obtained possession under a written or verbal agreement to purchase lands or tenements, and having failed to comply with his agreement withholds possession thereof, after demand in writing by the person entitled to such possession.” R. S. Ill. 1889, ch. 57, § 2.

Ejectment may be maintained against a vendee entering into possession of land under a contract of purchase, which he fails to perform on his part, on showing notice from the vendor that the contract is at an end. *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Harver v. Morris*, 4 Binn. (Penn.) 77.

In ejectment for non-payment of the purchase price under a contract of sale, defendant can not object that the amounts alleged to be due under the contract are barred by the statute, the theory of the complainant being, not that defendant is absolutely liable for such amounts, but that he should be adjudged to have forfeited his right to the land, unless he pay such amounts within a reasonable time fixed by the judgment. *Kerns v. Dean*, 77 Cal. 555; 19 Pac. Rep. 817.

§ 2. The Nature of the Relation Discussed.—This relation or privity in law differs in some respects from the relation of landlord and tenant. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor, whose rights are intended to be extinguished by the sale, and who has no continuing interest in the maintenance of his title, unless he should be liable in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor, is the payment of the purchase money.¹

§ 3. To What Cases the Rule Applies.—The general rule is that the title remains in the vendor until the conditions of the contract are fully complied with by the grantee. In its application the rule is confined in some jurisdictions to three classes of cases. (1) Where the contract is executory, as when an agreement or bond for a deed has been given. (2) When a mortgage to secure the payment of the purchase money is executed simultaneously with the deed of conveyance; and (3) when an express lien is retained in the deed of conveyance for

¹ *Blight's Lessee v. Rochester*, 7 43; *Watkins v. Holman*, 16 Pet. (U. S.) 535 (1822); see also *S.* 54; *Taylor Land. & T. Sec.* 14; see *Willison v. Watkins*, 3 Pet. (U. S.) also chapter XVIII, § 9.

the payment of the purchase money.¹ In others, it applies only to executory contracts for the conveyance of the title upon the performance of certain specified conditions by the grantee.²

§ 4. **Rescission of Contracts—The General Rule.** — The general rule is, that a party rescinding a contract must place the party to be affected by the rescission in his former state. The vendor of land seeking to rescind the contract of sale for non-payment of purchase money by the vendee, should first return or offer to return the unpaid notes and purchase money. There are undoubtedly many cases where the purchaser has been guilty of gross *laches*, in which the vendor would be justified in reselling to a third person, without first tendering to the first purchaser the money paid; either holding it, subject to his order, or until the equities between them, growing out of the contract and its violation by the purchaser, can be adjusted. But while the money paid need not in any case be returned as a preliminary to a rescission of the contract for a non-performance by the vendee, the unpaid negotiable notes must always be either returned or canceled, so that they can not be negotiated and their payment enforced. The vendor who rescinds a contract must place himself in a position where he can not enforce the contract as against the vendee. He can not be permitted to retain the notes with the power of negotiating them to innocent purchasers, and at the same time insist that the contract is terminated and the rights of the vendee extinguished.³

When the vendee has paid part of the purchase money, and given his notes for the balance, before the vendor can rescind the contract, he must return, or offer to return, money paid, with legal interest, less reasonable rental value of premises, if vendee has been in possession, and also all unpaid notes. *Frink v. Thomas* (Or.), 25 Pac. Rep. 717; Am. Dig. 1891, 4481.

Where a vendor elected to rescind the contract, he was bound to return money paid thereon, and no demand therefor was necessary before suit to recover it. *Drew v. Pedlar* (Cal.), 25 Pac. Rep. 749 (1891.)

¹ *McHan v. Stansell*, 39 Ga. 197; *Walker v. Emerson*, 20 Tex. 706; *Alston v. Wingfield*, 53 Ga. 18; *Day Baumgarten v. Smith*, 37 Tex. 439; *v. Solomon*, 40 Ga. 32; *Tompkins v. Alston v. Wingfield*, 53 Ga. 18; *Ware Williams*, 19 Ga. 569; *Miller v. Swift*, *v. Jackson*, 19 Ga. 452.

39 Ga. 91.

² *Lawrence, J.*, in *Staley v. Murphy*, 47 Ill. 241 (1868); *Murphy v. The Howards v. Davis*, 6 Tex. 174; *Lockwood*, 21 Ill. 615; *Thompson v. Dunlap v. Wright*, 11 Tex. 597; *Bruen*, 46 Ill. 125; *Christman v. Baker v. Ramey*, 27 Tex. 52; *Peters Miller*, 21 Ill. 236.

v. Clements, 46 Tex. 114; citing

Under a contract of sale providing that upon forfeiture of the contract, which may be declared by notice given on default of payments, the vendor may retain the moneys paid as compensation for use of premises, he is not entitled, in an action to recover possession, to recover rents for any period prior to notice of forfeiture. *Kerns v. Dean*, 77 Cal. 555; 19 Pac. Rep. 817.

Where the payment of the purchase money and the making of the deed are to occur simultaneously, the complaint, in a suit by the vendor for a rescission of a contract, on account of a failure to pay purchase money, must allege that he has tendered to the vendee a valid deed, conveying to him all the land according to the terms of the agreement, and demanded performance on the part of the vendee, unless a tender was excused by the conduct of the vendee. *Frink v. Thomas* (Or.), 25 Pac. Rep. 717; Am. Dig. 1891, 4482.

Even though the vendee had made default, and surrendered possession to his vendor before he made such conveyance, the vendor can not defeat the recovery of the land by the grantee therein where he recognized the validity of such grantee's title, and induced him to rely on it until the debt, in payment of which he took the land, was barred by limitation. *Huffman v. Mulkey*, 78 Tex. 556; 14 S. W. Rep. 1029 (1891).

Where one who holds land under a deed reserving a lien for the purchase money, which is wholly unpaid, conveys, before his grantor has the right to rescind, to a third person, no rights acquired by the latter under this conveyance can be affected by any subsequent agreement between the original vendor and vendee. *Huffman v. Mulkey*, 78 Tex. 556; 14 S. W. Rep. 1029 (1891).

In ejectment by the vendee against his vendor, and for damages for trespass and breach of warranty, the fact that the petition shows that one of the purchase money notes for which a vendor's lien was retained, is past due, but makes no offer to pay the same, does not render the petition defective. If the vendee's claims are sustained, they may constitute a valid set-off against the note. *Roy v. Clark*, 75 Tex. 28; 12 S. W. Rep. 845 (1890).

Where one who holds land under a deed reserving a lien for the purchase money, which is wholly unpaid, conveys, before his grantor has the right to rescind, to a third person, the original vendor can claim no superior right as such, in the land so conveyed, unless he shows that before the conveyance he had the right to rescind the original contract for non-payment of the purchase money when it became due. *Huffman v. Mulkey*, 78 Tex. 556; 14 S. W. Rep. 1029 (1891).

Where the vendor is prevented from complying with his contract by the wrongful act of the vendee in obtaining an outstanding title to a portion of the land, so far as that portion of the land is concerned, in a suit by vendor to rescind, the vendee is estopped from claiming that no tender of deed has been made. *Frink v. Thomas*, (Or.) 25 Pac. Rep. 717; Am Dig. 1891, 4480.

Where one purchases an option on real estate for a sum which is to be forfeited in case the purchase of the land is not closed by a certain date, and the seller is not the owner of the whole title he contracts to convey, the purchaser, on learning of the defect, may rescind the contract and recover the amount paid, though the seller offers after notice of rescission to perfect his title, but fails to do so in time. *Burks v. Davies*, 85 Cal. 110; 24 Pac. Rep. 613.

Defendant contracted to convey land to plaintiff, "free from all incumbrances except said \$15,000 mortgage and existing tenancies, and subject to lease to Claus Tibken, expiring May 1, 1889." In fact, though plaintiff was ignorant thereof, the Tibken lease contained a covenant for renewal for two years at the same rental. *Held*, that such covenant constituted an undisclosed incumbrance, which justified plaintiff in rescinding the contract. *Fruhauf v. Bendheim*, 53 Hun, 636; 6 N. Y. Sup. 264 (1889).

The owner of land, who had agreed to sell it, executed a deed for it, prepared and sent to him by the vendee, and sent the deed and a note for the price to a third person, C., at the same time informing the vendee that he had sent the deed and the note to C., to be held until the note was paid, "as that lien on note is no good, and by placing it with C. it makes us both secure." The vendee insisted that the lien was good, and asked for an order for the deed, but the vendor declined. The note was not paid at maturity, when the vendor informed the vendee that he would declare the contract forfeited, unless the note was paid by a certain time, and did so declare it, on the expiration of that time without payment. *Held*, that the contract was properly declared forfeited, as it was not executed, and as the vendee had not complied therewith. *Doane v. Dixon* (Tex.), 11 S. W. Rep. 1081; Am. Dig. 1889, 3866.

A contract for the sale of land was rescinded on the vendee's default at his request, and it was orally agreed between him and the vendor that he should retain possession of the land a few months longer, cut the hay on the premises, and feed it to the vendor's cows. *Held*, that the rescission of the contract discharged the vendee's equitable right in the land, and constituted him the vendor's servant in cutting and feeding the hay, and that his subsequent assignment of the contract of sale to a third person was ineffectual to pass title to the hay as against the vendor. *Davis v. Willis*, 57 Hun, 200; 10 N. Y. Sup. 883.

§ 5. **The Rescission Must Be in Toto.**—A party entitled to rescind a contract can not rescind it in part. The rescission to be effectual must be *in toto*.¹

§ 6. **Practice—Mode of Rescission.**—The law requires of a vendor in rescinding a contract of purchase for the conveyance of real property, some visible outward and notorious acts, evincing in a clear and unmistakable manner his intention to declare a forfeiture. No particular form of words or acts are required but the intention to rescind must be clear and unequivocal.²

¹ *Bolvall v. Diller*, 41 Calif. 532; ² The practice recommended is for see *Askerly v. Vilas*, 15 Wis. 401; the vendor to declare the forfeiture in *Duggle v. Boulden*, 48 Wis. 477; writing and cause a copy to be served *Pierce v. Nichols*, 1 Paige, Ch. (N. Y.), on the vendee, and for this purpose 244; *Dressell v. Jordan*, 104 Mass. the following form is suggested: 407; *Fletcher v. Wilson*, 1 S. & M. (Miss.) 376.

To _____,
 Of _____, in the County of _____ State of _____
 THIS DECLARATION, made this _____ day of _____ A. D. 18—, Witnesseth:
 WHEREAS, by a certain contract in writing, made and entered into on
 the _____ day of _____, A. D. 18—, by and between _____
 _____, of _____, in the County of _____ and State of _____
 party of the first part, and _____, of _____, in the
 County of _____, and State of _____, party of the second part, which
 contract was duly recorded in the recorder's office of _____ County, on the
 _____ day of _____, A. D. 18—, in Book _____, on page _____,
 the said party of the second part, in consideration that the said party of the
 first part would convey to _____ the following described lands, situated in
 the County of _____, State of _____, viz.: _____

_____,
 covenanted and agreed to pay to said party of the first part the sum of
 _____ dollars, as follows:

and further covenanted to pay all taxes, assessments or impositions that
 should be legally levied upon said land subsequent to the year—.

AND WHEREAS, the said party of the second part further covenanted in
 said contract, that in case of a failure on his part to make any of the pay-
 ments, or any part thereof, or to perform any of the covenants by him
 agreed therein to be made or performed, then in such case the said contract
 should, at the option of the party of the first part, be forfeited and deter-
 mined, and all payments made thereon should be forfeited to said party of
 the first part, and the said party of the first part should have the right to
 re-enter and take possession of said land; and it was also mutually agreed
 between the parties to said contract, that the time of payment should be an
 essential part of said contract.

AND WHEREAS, the said _____, party of the second part, has made default
 in the payment of _____

NOW THEREFORE, I, _____ the party of the
 first part, by virtue of the power in said contract mentioned, and by reason
 of the failure of the said party of the second part to perform as above stated,
 have elected to declare the aforesaid contract and all payments made
 thereon, forfeited and determined, and by these presents do declare my
 election to consider the aforementioned contract forfeited and determined;
 and I hereby declare my right to retain all payments made on said contract,
 and my right of re-entry upon and possession of said land.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, the day
 and year first above written.

_____[SEAL.]

Form of contract upon which the foregoing notice is based :

ARTICLES OF AGREEMENT, made this _____ day of _____ in the year of our
 Lord one thousand eight hundred and ninety—, between _____
 _____, party of the first part, and _____, party
 of the second part,

WITNESSETH, that, if the party of the second part shall first make the
 payments and perform the covenants hereinafter mentioned on _____ part
 to be made and performed, the said party of the first part hereby covenants
 and agrees to convey and assure to the said party of the second part, in fee

simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, the lot-, piece- or parcel of ground, situated in the County of _____ and State of _____ known and described as _____ and the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of _____ dollars in the manner following: _____ with interest at the rate of _____ per centum per annum, payable _____ annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land, subsequent to the year _____. And in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on _____ part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by _____ on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by _____ sustained, and _____ shall have the right to re-enter and take possession of the premises aforesaid.

IT IS MUTUALLY AGREED, by and between the parties hereto, that the time of payment shall be the essence of this contract and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in presence of	}	_____ [SEAL.]
_____		_____ [SEAL.]
_____		_____ [SEAL.]

Form of bond for a deed, etc.:

KNOW ALL MEN BY THESE PRESENTS that we _____ of the County of _____ and State of _____ held and firmly bound unto _____ of the County of _____ and State of _____ in the penal sum of _____ dollars, to be paid unto the said _____ heirs, executors, administrators or assigns, to which payment well and truly to be made _____ bind _____ heirs, executors, administrators, and every of them, firmly by these presents.

SEALED with _____ seal-, and dated the _____ day of _____ A. D. 189—

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that, whereas, the above bounden _____ ha— this day sold to the said _____ heirs and assigns, for the sum of _____ dollars, all the following described lot-, piece-, or parcel- of land, to-wit: _____ which sum of _____ dollars is to be paid in the manner following: _____ with interest at the rate of _____ per cent. per annum payable _____ annually on the whole sum remaining from time to time unpaid.

Upon the payment of the said sums being made at the time and in the manner aforesaid, and of all taxes, assessments or impositions that may be legally levied or imposed upon said land subsequent to _____ A. D. 189—, the said _____ heirs, executors and assigns, cove-

nant- and agree- to and with the said _____ heirs, executors, administrators and assigns, to execute a good and sufficient deed of conveyance, in fee simple, free from all incumbrance, with full covenants of warranty for the above described premises.

Now, if the said _____ shall well and truly keep, observe and perform _____ covenants and agreements herein contained on _____ part to be kept and performed, then this obligation to be void; otherwise to remain in full force and virtue. It is expressly understood and agreed by and between the parties hereto, that time is of the essence of this contract, and, that in the event of the non-payment of said sum of money, or any part thereof, or the interest thereon, at the time or times herein named for its payment, that then the said _____ absolutely discharged at law and in equity from any and all liability to make and execute such deed.

Signed, sealed and delivered in the	}	_____ [SEAL.]
presence of _____		_____ [SEAL.]
_____		_____ [SEAL.]
_____		_____ [SEAL.]

§ 7. **Possession Under a Contract of Purchase.**—Where no provisions are contained in a contract for the sale of real property for the possession of the premises, there is no implied authority for the vendee to enter. The facts are opposed to the idea that he is to come into possession of the consideration before he has complied with the contract on his part. When the contract is silent as to the possession of the land it remains with the vendor.¹

§ 8. **The Capacity in Which the Vendee Holds.**—When a vendee enters into possession under an executory contract for the purchase of real property, it is held that he holds as a mere licensee and he can not be considered as holding adversely to the vendor until he has performed all of the conditions of the contract on his part and is entitled to a conveyance.²

§ 9. **Estoppel of the Vendee to Deny Title.**—In a strict legal sense the law applicable to the relation of landlord and tenant does not apply to the relation of vendor and vendee. But when the vendee is in possession of real property under an executory contract and fails to comply with the conditions of the contract, and is made a defendant in an

¹ *Burnett v. Caldwell*, 9 Wall. (U.S.) Matter of Department of Parks, 73 290; *Doolittle v. Eddy*, 7 Barb. (N. Y. 560; *Young v. Irwin*, 2 Hay. Y.) 74; *Munford v. Whitney*, 15 (N. C.) 9, 66; *Devyr v. Schaefer*, 55 Wend. (N. Y.) 380. (N. Y.) 446; *Briggs v. Prosser*, 14

² *Seabury v. Stewart*, 22 Ala. 207; Wend. (N. Y.) 227; *Jackson v. John-Brennan v. Stewart*, 30 Miss. 49; son, 5 Cow. (N. Y.) 74.

action of ejectment brought against him by the vendor, he is estopped from disputing his vendor's title or from setting up an outstanding title in a third person to defeat its recovery.¹

§ 10. **The Law Stated by Mr. Justice Field.**—A vendee can not dispute his vendor's title at the time of conveyance so as to avoid payment of the purchase price of the property, nor can he, in a contest with another, while relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he can not assert that the title, obtained from his grantor or through him, is sufficient for his protection and not available to his contestant. Where both parties assert title from a common grantor and no other source, neither can deny that such grantor had a valid title when he executed his conveyance.²

§ 11. **Notice to Quit, etc.**—The general rule in the American States is, that the vendee is not entitled to notice to quit, though he enters into possession of the premises by the assent of the vendor, and the action of ejectment may be maintained against him upon his failure to perform his part of the contract, and notice from the vendor that it has been rescinded.³

The rule is different in England. *Right v. Beard*, 13 East, 210. It has been held, in one case at least, that the vendee of land who has paid a part of the purchase money, enters into possession, and fails to pay the residue according to the terms of the contract of sale, can not be dispossessed by the action of ejectment in favor of the vendor, without a notice to quit, or a notice that the contract is rescinded, or a demand of payment and notice of rescinding such contract. *Costigan v. Wood*, 5 Cranch C. C. (U. S.) 507; see *Notice to Quit*, in chapter XXII, *Adverse Possession*.

¹*Jackson v. Huntington*, 5 Pet. (U. S.) 402; *Harvey v. Morris*, 63 Mo. 475; *Persling v. Canfield*, 70 Mo. 140; *Bat.* 51; *Gilliam v. Bird*, 8 Ired. (N. C.) 280; see chapter XVII, *Chain of Title*.
²*Robertson v. Pickrell*, 109 U. S. 608 (1883); *Ives v. Sawyer*, 4 Dev. & Persling v. Canfield, 70 Mo. 140; *Bat.* 51; *Gilliam v. Bird*, 8 Ired. (N. C.) 280; see chapter XVII, *Chain of Title*.
³*Hotailing v. Hotailing*, 47 Barb. (N. Y.) 163; *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Jackson v. Miller*, 7 Cow. (N. Y.) 747; 6 Wend. (N. Y.) 228; *Maynard v. Cable*, Wright, (Ohio), 18; *Baker v. Gittings*, 16 Ohio, 485; *Wright v. Moore*, 21 Wend. (N. Y.) 233; *Gregg v. Von Phul*, 1 Wall. 560.
 see also chapter XVIII, *Estoppel to Deny Title*, §§ 9 and 10.

§ 12. **The Burden of Proof.**—In an action of ejectment, where the plaintiff seeks to recover on the ground that the defendant has not performed his covenants in neglecting to pay the notes given for the purchase money of the premises in question or otherwise, the burden of proof is upon the plaintiff to show such default.¹

§ 13. **The Vendor's Remedy—Burden of Proof.**—When a vendor brings an action for a specific performance of a contract of sale of real property, the burden of proof is upon him to show a strict performance of the conditions of the contract on his part; but when he brings an action of ejectment to recover the possession, the vendee can defend only by showing upon his part a complete performance of the contract.² After default on the part of the vendee in the payment of the purchase money or other conditions of the contract, the vendor may treat it as rescinded and bring an action of ejectment for the recovery of his possession.³

§ 14. **Repudiation of the Contract by the Vendee.**—The vendee may forfeit his rights under a contract for purchase of real property by repudiation, as well as by his failure to comply with its conditions. In such a case the same rule as to demand for possession and notice to quit applies. His subsequent possession becomes wrongful and the vendor has an immediate right of action to recover the possession.⁴

After a sale of land, and before a conveyance of the legal title, the vendor is held to be the trustee of the vendee, and the act of limitations has no operation. But when the vendor disavows the trust, and, after having delivered possession to the vendee, leases the premises to a third person in opposition to the title of the vendee, and the lessee enters and holds possession, a disseizin may be presumed, and if the vendee suffers twenty years to elapse without prosecuting his claim, it will be barred by the statute of limitations. *Pipher v. Lodge*, 4 Serg. & R. (Penn.) 310.

A vendor may acquire title to land sold, by adverse possession, as against

¹ *Roland v. Fisher*, 30 Ill. 224 274; *Burnett v. Caldwell*, 9 Wall. (1863). (U. S.) 290; *Prentice v. Wilson*, 14

² *Burnett v. Caldwell*, 9 Wall. (U. Ill. 92; *Baker v. Gittings*, 16 Ohio S.) 290; *Wright v. Moore*, 21 Wend. 389. (N. Y.) 230; *Pierce v. Tuthill*, 53 Barb. (N. Y.) 155. The contrary rule as to notice seems to exist in England and also

³ *Home Mfg. Co. v. Gough*, 2 Ill. in Virginia. *Right v. Beard*, 13 App. 477; *Crary v. Smith*, 2 N. Y. East, 210; *Troyman v. Hawkly*, 24 Gratt. (Va.) 512; and in some States a

⁴ *Moke v. Bryant*, 51 Miss. 560; notice is made necessary by statute. *Gregg v. Von Phul*, 1 Wall. (U. S.)

his vendee and those claiming under the latter, though he conveyed by warranty deed. *Harne v. Smith*, 76 Tex. 310; 15 S. W. Rep. 240.

§ 15. **Ejectment Against Strangers.**—In actions by a vendor or vendee for the recovery of the possession of real property from strangers, trespassers, or mere intruders, the defendant, having no interest in matters of complaint or defense existing between the parties to the contract, can not plead such matters in defense of the action. A recovery in an action against a stranger does not affect the status of the parties but inures to the successful party upon an adjudication of their respective rights.¹

§ 16. **Ejectment by Vendee.**—In regard to an action for the recovery of the possession of the land by a vendee claiming under a bond or agreement for a conveyance of the title against the vendor, the general rule is that he can not sustain the action, for he has only an equity in the form of a promise of the title, which is in most of the States insufficient to maintain ejectment.² He must bring his action in equity for a specific performance of the contract and a vestiture in him of the legal title.

In Georgia a vendor is not liable to an action for the recovery of the possession of land at the suit of a vendee under a bond for a conveyance of the title until the purchase money has been paid or unconditionally tendered. *Miller v. Swift*, 39 Ga. 91.

In Pennsylvania, where no time for the delivery of possession was mentioned in the contract, and, before the day fixed for the payment of the purchase money, the vendee entered into possession with the consent of the vendor, and the purchase money remained partially unpaid, it was held that the vendee could, without tendering the balance of the purchase money, recover in ejectment the possession of the land from the vendor who had unlawfully obtained possession through the unauthorized act of a third person. *Harris v. Bell*, 10 Serg. & R. (Penn.) 39.

§ 17. **Defenses.**—An entry under a contract of purchase is an entry by lease and license which, while it remains unrevoled and not rescinded, protects such possession and is a defense in an action of ejectment by the vendor. But it is no defense when the vendee has failed to make his payments or to perform any of the conditions or covenants contained in the contract. And the fact that there is a mortgage upon the premises which is a lien beyond the incumbrances mentioned in the contract and assumed by the vendee, is no defense

¹*Hooper v. Stoll*, 30 Tex. 154; ²*Trammell v. Simmons*, 17 Ala. Wright v. Thompson, 14 Tex. 558. 411.

when there is a balance of purchase money still due over and above the amount of all the incumbrances.¹

If the vendee is not satisfied to take the title of the land, he should specify his objections and surrender the possession; or if he is willing to surrender the possession, and proposes, notwithstanding the mortgage, to affirm the contract and insist on its execution, he should, at the time a deed is tendered and the money demanded, tender all the purchase money except a sum sufficient to discharge the incumbrances, and specify his objections to the deed, if he has any other. *Pierce v. Tuttle*, 53 Barb. (N. Y.) 155. But see *Cythe v. La Fontain*, 51 Barb. (N. Y.) 186.

After the plaintiff in an action of ejectment has made out a *prima facie* case to entitle him to recover, if the defendant can show an equitable right to the possession in a third person, under whom he claims, this evidence will be legitimate and proper, and will constitute a complete equitable defense to the action. *Safford v. Hynds*, 39 Barb. (N. Y.) 625; *Traphagen v. Traphagen*, 40 Barb. (N. Y.) 537.

§ 18. **Equitable Titles Adjusted.**—Under the modern practice in many of the American States a defendant vendee in an action of ejectment may assert equitable rights in his defense in the same manner as such rights are asserted in actions for the specific performance of the contract. Especially is this the rule in States where the distinction between equity and law is abolished. The tendency of modern jurisprudence is to avoid a multiplicity of suits in cases where all matters between the parties to the action can be completely adjusted, and with fairness, in one suit.²

In Minnesota, the defendant may set up any equities relating to the right of possession which would have been sufficient under the common law to sustain an injunction to restrain the prosecution of the suit in ejectment until the equities could be adjusted. *Gates v. Smith*, 2 Minn. 30; *Barker v. Walbridge*, 14 Minn. 469; *Williams v. Murphy*, 21 Minn. 534.

In New York, where a vendor brought an action of ejectment against a vendee in possession of the land under a contract for its sale, it was held that the vendee could, in defense of the action, assert equitable rights, the same as he might if the action were for a specific performance of the contract. *Cavalli v. Allen*, 57 N. Y. 508.

§ 19. **Liquidated Demands Set Off Against Purchase Money.**—In States where the distinction between law and equity is abolished and all the relief to which the parties are entitled can be adjusted in a single proceeding without a resort to a multiplicity of suits, where an action of ejectment is brought by a vendor against a vendee for a failure in the payment of the purchase money, if the vendor is indebted to the vendee

¹ *Pierce v. Tuttle*, 53 Barb. (N. Y.) 155. ² *Cavalli v. Allen*, 57 N. Y. 508.

upon an independent claim he may plead it as a defense and have it applied in payment of the purchase money.¹

Although, under the New York Code, the action of ejectment may be met by an equitable title of the defendant, and a claim for a conveyance of the legal estate, yet, in order to defeat a recovery, the defendant must become an actor in respect to his claim; and his answer must contain all the elements of a bill for a specific performance; and he must ask and obtain affirmative relief. An answer, in an action of ejectment, which sets up an agreement between the parties, in respect to the premises, and alleges that the defendant has offered to perform, and has always been and is ready and willing to perform, but in which the defendant does not offer to perform, nor ask that the plaintiff be required to perform, nor claim any judgment except for costs, is defective. *Dewey v. Hoag*, 15 Barb. (N. Y.) 365.

§ 20. **Failure of Title in Vendor.**—It has been held that a failure of or a defect in the title of a vendor is no defense in an action of ejectment against a vendee in default of the payment of the purchase money. If he is not content with the title offered him he must surrender the possession of the land.² Though it seems if the vendee has made improvements under the provisions of his contract, requiring expenditures, as a condition precedent to entitle him to a deed, and the vendor's title proves defective, he has an equitable lien upon the premises for the money so expended which entitles him to hold the possession, as against the vendor, in ejectment.³

Where, on the day fixed for consummating a sale of land, the vendor has made arrangements with the owner and the mortgagee of the land to convey and release, so that he is ready, able and willing to fulfill the contract on his part, and he tenders such performance, but the vendee refuses to buy on the alleged ground of deficiency in the quantity of the land, the vendor has a right to rescind the contract. *Lane v. Lesser* (Ill.), 26 N. E. Rep. 522; Am. Dig. 1891, 4479.

In an action for the cancellation of a contract for the sale of land, in which time was made essential, where it appeared that though the strict requirements of the contract as to time were waived by plaintiff, so as to entitle defendants to reasonable notice of her intention to terminate the contract upon non-performance on their part, yet that by subsequently refusing to accept a proffered conveyance from plaintiff on the sole ground that her title was not good (when it was in fact unexceptionable), they

¹ *Cavalli v. Allen*, 57 N. Y. 508; ² *Vide v. Troy, etc.*, R. R. Co., 20 N. Cythe v. La Fountain, 51 Barb. (N. Y. 184; *Hill v. Winn*, 60 Ga. 337; Y.) 186; *Traphagen v. Traphagen*, 40 Pierce v. Tuttle, 53 Barb. (N. Y.) Barb. (N. Y.) 537; *Love v. Watkins*, 155; *Jackson v. McGinness*, 14 Pa. 40 Calif. 547; *Young v. Montgomery*, St. 331; *McIndoe v. Morman*, 26 Wis. 28 Mo. 604; *Tibeau v. Tibeau*, 19 Mo. 588; *Diggle v. Boulden*, 48 Wis. 477. 78; *Carpenter v. Ottley*, 2 Lans. (N. Y.) 451; *Richards v. Elwell*, 48 Pa. St. 361. ³ *Gilbert v. Peteler*, 38 N. Y. 165.

waived and surrendered their rights to further time or notice, and thereupon the plaintiff was justified in putting an end to the contract. *Cummings v. Rogers*, 36 Minn. 317; 30 N. W. Rep. 892 (1887).

In action of ejectment by the obligor of a bond for title against an obligee in possession in default as to part of the purchase money, the defense was insolvency of the vendor, and the fact that he had no title, but only a bond for title, and had not paid his vendor. It was held that these facts might have constituted sufficient ground for a rescission of the contract, but afforded no defense, and no reason why the obligee should keep both the purchase money and the possession of the land. *Hill v. Winn*, 60 Ga. 337.

§ 21. **Where the Vendor Has Parted with His Title.**—If the vendor has actually made a conveyance, his title is extinguished in law as well as equity, and it will not be pretended that he can maintain an action of ejectment after he has parted with the title. If he has sold, but has not conveyed, the contract of sale binds him to convey unless it be conditional. If after such a contract, he brings an action of ejectment for the possession of the land, he violates his own contract, unless the condition be broken by the vendee; and if it be broken the burden is upon the vendor to show it.¹

§ 22. **Eviction as a Defense.**—A vendee under a contract for the sale of real property can not resist the payment of the purchase money on the ground that the title of the vendor under which he holds is defective, but if he has been evicted by a title outstanding in a third person and of which he had no notice at the time he entered into the contract, and to whom he has lawfully attorned, he may show these facts and defeat a recovery.²

§ 23. **A Forfeiture May Be Waived.**—Like all other rights of a similar character, the right to rescind a contract for a non-compliance with its terms may be waived. What constitutes a waiver must depend upon the peculiar circumstances of each case. As a general rule it may be stated that any act of the vendor which has the effect to release the vendee from the strict performance of the stipulated conditions will in law amount to a waiver of the right to rescind the contract and hence a waiver of a forfeiture.³

A purchaser who, after institution of a suit to rescind a sale, pays interest

¹ *Blight's Lessee v. Rochester*, 7 erton v. Pickham, 11 Paige Ch. (N. Wheat. (U. S.) 535 (1822). Y.) 382; *Durand v. Sage*, 11 Wis. 151;

² *Demaret v. Bennett*, 29 Tex. 263; *Cythe v. La Fountain*, 51 Barb. (N. Price v. Blount, 41 Tex. 472. Y.) 186.

³ *Blair v. Blair*, 48 Iowa, 395; *Edg-*

on a note of his vendor, in the hands of a third person, assumed by him as a part of the price of the lands bought, and which he had bound himself before the sale to pay to such person, can not be treated as one voluntarily ratifying the sale, so as to deprive him of the right to prosecute the suit against his vendors to rescind the sale. *Breaux v. Savoie*, 39 La. An. 243; 1 So. Rep. 614 (1887).

When the time of payment fixed in the contract had been indefinitely extended with the consent of the vendor, it was held that he could not afterward insist upon a forfeiture without notice to the vendee to complete his payment within a reasonable time. *Cythe v. La Fountain*, 51 Barb. (N. Y.) 186.

When a vendor stated to the vendee that he would not insist upon the forfeiture provided for in the contract in case of a default in prompt payments, and upon the strength of these statements the vendee allowed the payment to become delinquent and in arrears, it was held that the right to declare a forfeiture was waived. *Blair v. Blair*, 48 Iowa, 393.

In 1882, vendor conveyed to vendee, for \$600, \$200 in cash, balance in one, two, three and four years, and a vendor's lien was retained. In January, 1885, the parties contracted in writing that vendee should remain in possession until March 1, 1886, on the following conditions: To take care of the property, pay taxes and peaceably surrender possession, give up the deed she then held, and the vendor to give up the notes held against the vendee, and the former sale to be recanted; but, if the vendee should meet all payments due to that date with a probability of meeting the remaining deferred payments, then the original contract to be in force, otherwise not. On bill filed January, 1886, to enforce the vendor's lien, vendee filed the agreement of January, 1885, with her answer, and relied thereon as a release of the lien, and a rescission of the contract to pay the balance of purchase money. *Held*, that the vendor's lien was released and the contract to pay the purchase price rescinded. *MacCutcheon v. Ingraham*, 32 W. Va. 378; 9 S. E. Rep. 260 (1889).

A sold by contract to B forty acres of land for \$400, \$50 cash and balance in one, two, three and four years. The first and second payments were made, but B never had possession. A conveyed the land to C, and B, treating the contract as broken and rescinded by A, sued for the recovery of the money paid him, with interest. *Held* that, by the suit, he had elected not to sue for damages for the breach of the contract, but to treat the contract as rescinded, and sue for the money paid under it, and that he was entitled to recover. *Weaver v. Aitcheson*, 65 Mich. 285; 32 N. W. Rep. 436.

CHAPTER VIII.

EJECTMENT BETWEEN LANDLORD AND TENANT.

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§ 1. **Ejectment Between Landlord and Tenant.**—The action of ejectment as a remedy, by which a landlord may recover the possession of lands unlawfully withheld from him by a tenant, is one which often proves itself inadequate, dilatory and very expensive.¹ The remedy, however, still exists in the American States, and is in some instances probably the most effective of all remedies given for the recovery of real property where the relation of landlord and tenant exists, though as a practical remedy between landlord and tenant, it has fallen into disuse in the great majority of cases.

The relation of landlord must exist between the parties. Occupation of lands by a person without a recognition of the owner as his landlord, or any agreement, express or implied, to hold under and in subordination to him is merely a trespass and does not create the relationship of landlord and tenant. *Dixon v. Ahern*, 19 Nev. 422; 14 Pac. Rep. 598; 24 Pac. Rep. 337 (1890).

Where the evidence for plaintiff showed that defendant occupied and used the land; that he refused to allow others, to whom plaintiff leased part of the land, to enter upon it, pretending to have leased the land of another,

¹ Adams on Ejectment, 187.

and to have paid rent on it; and that a written lease had been made out from plaintiff to defendant for the preceding year, during which defendant had also occupied the land, but was never executed: *Held*, that defendant's possession was adverse to plaintiff, and the latter could not recover. *Pico v. Phelan*, 77 Cal. 86; 19 Pac. Rep. 186 (1888).

As rent may be reserved in services as well as money, a statement that a person was in possession, and had the use of premises under an agreement to keep off trespassers, and that he did so, is equivalent to saying that he was a tenant. *Shaw v. Hill*, 79 Mich. 86; 44 N. W. Rep. 422 (1890).

A landlord can not support ejectment against his lessee, during the time devised, without a forfeiture of the lease. *Penn v. Divellin*, 2 Yates (Penn.), 309.

A tenant ejected in landlord and tenant proceedings which are afterward set aside on writ of error, can not maintain ejectment, his term having expired before he brought suit. *Horner v. Marietta*, 135 Pa. St. 418; 19 Atl. Rep. 1029 (1890).

§ 2. Essentials of the Plaintiff's Case.—In order to maintain an action of ejectment against his tenant for the recovery of the possession of the demised premises, the landlord must prove at the time of commencing the action a present right to the immediate possession of the premises; this right of possession may be established by showing that the term for which the premises were let had expired according to the provisions of the lease; that the tenancy had been actually terminated by a forfeiture of its conditions, or in some other manner sufficient in law. The discussion of this right naturally resolves itself into two divisions:

(1) The tenancy ended by the expiration of the term.

(2) The tenancy ended by a forfeiture or other manner sufficient in law to terminate the relation of landlord and tenant.

Plaintiff failing to show possession by himself at any time, the defendant, showing that he had been continually in possession, though a tenant of another part of the same tract or survey, is entitled to judgment. *Dills v. Justice* (Ky.), 9 S. W. Rep. 290 (1888).

§ 3. The Tenancy Ended by Expiration of the Term.—Where tenancies are determined by the expiration of the term, or the happening of a particular event, the right of entry in the landlord at once accrues, and he may proceed to recover the premises without notice or demand of possession. Few comments, therefore, are necessary upon this division of the subject.¹

¹ *McCreary v. Marston*, 56 Calif. (Mass.) 43; *Roe v. Ward*, 14 Blk. 97; 403; *Clark v. Rhodes*, 79 Ind. 342; *Luford v. Barber*, 1 T. R. 86; *Adams Russell v. McCartney*, 21 Mo. App. on Ejectment, 141; *Coke on Littleton*, 544; *Ashley v. Warner*, 11 Gray 216; *Shep. Touch.* 187.

In the majority of cases the tenancy terminates *ex vi termini*; the relation of landlord and tenant ceases, giving the landlord the right of possession at once, and placing the tenant in the position of a wrongdoer if he withholds the possession.¹

§ 4. Power to End the Tenancy on the Happening of an Event, etc.—The power of determining a tenancy is necessarily consequent upon the right of creating one; and the law implies a mutual reservation of such power in all contracts between landlords and tenants, whenever it is not expressly reserved. Whenever such power is expressly reserved, as, for example, in tenancies for terms certain, or until a person named shall attain the age of twenty-one years, or so long as the tenant shall perform certain covenants, and the like, the determination of the tenancy is, of course, dependent upon the terms of the reservation; and it will cease when the term ends, the event happens, or the covenants are broken.²

§ 5. Determination of the Relation by Act of the Lessor—Notice to Quit—The Rule at Common Law.—Until the reign of Henry VII, a tenant, having a lease for a definite period, had no full and complete remedy when ousted of his possession. Tenants, who, during those times, occupied lands without any specific grant, held them by a far more precarious tenure. A general occupation or holding of land without any certain or determinable estate being limited therein, was considered as a holding at the will of the owner; and the tenant was liable to be ejected at any moment by the simple determination of his landlord's will. But the same enlightened policy which secured to lessees for years the complete possession of their terms, soon extended itself also to those general holdings,

¹ *Schreiber v. R. R. Co.*, 115 Ill. 340; 43; *Market Co. v. Hoffman*, 101 U. S. 112; *Market Co. v. Hoffman*, 101 U. S. 112; *McClure v. McClure*, 74 Ind. 108; *Alcovo v. Morgan*, 77 Ind. 184; *Shuver v. Klinkenberg*, 67 Iowa, 544; *Lithgow v. Moody*, 35 Me. 214; *Hulett v. Nugent*, 71 Mo. 131; *McGregor v. Rawle*, 57 Pa. St. 184; *Shipman v. Mitchell*, 64 Tex. 174; *Jackson v. Parkhurst*, 5 Johns. (N. Y.) 128; *Dorrell v. Johnson*, 17 Pick. (Mass.) 263; 12 Am. & Eng. Ency. 757.

² *Ashley v. Warner*, 11 Gray (Mass.),

43; Market Co. v. Hoffman, 101 U. S. 112; *McClure v. McClure*, 74 Ind. 108; *Fort v. McGrath*, 7 Ill. App. 302; *Kellogg v. Groves*, 53 Iowa, 395; *Preble v. Hay*, 32 Me. 456; *McCanna v. Johnson*, 19 Pa. St. 434; *McCreary v. Marston*, 56 Calif. 403; *Russell v. McCartney*, 21 Mo. App. 544; *Ludford v. Barber*, 1 T. R. 86; *Roe v. Ward*, 1 H. Blk. 97; *Adams on Ejectment*, 140; *Coke on Littleton*, 216.

called tenancies at will; and in the reign of Henry VIII,¹ it was held by the courts that a general holding should be considered to be a tenancy from year to year; and that a person so holding should not be ejected from his lands, without a reasonable notice from his landlord to relinquish the possession. It was also settled that this reasonable notice should be a notice for half a year, expiring at the end of the tenancy; because otherwise, a notice, reasonable as to duration, might be given, which would, notwithstanding, operate greatly to the prejudice of the tenant, by ejecting him from his lands and immediately before the harvest, or other valuable period of the year; and this rule has remained as the rule at common law to the present day, except where a different time is established, either by express agreement, immemorial custom² or statutory enactments in the American States.

§ 6. **Tenant from Year to Year Defined.**—A tenant from year to year, is he to whom another has let lands or tenements, without any certain or determinate estate, especially if an annual rent be reserved.³ The holding or term is denoted a tenancy from year to year. And when a person is let into possession as a tenant without any agreement as to time, the inference now is, that he is a tenant from year to year until the contrary be proved. The difference between a tenant from year to year and a tenant for years is rather a distinction in words than in substance.⁴ The reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year.⁵ But it is wholly immaterial how the rent is paid, whether by the year, quarterly, by the month or otherwise.⁶

As uncertainty of time is the principal element in tenancies

¹ 13 Hen. VIII, 15; see *Tham v. Hamburg*, 2 Brewst. (Penn.) 528; *Seaton v. Davis*, 2 Thomp., etc. (N.Y.) 91; *Ross v. Van Aulen*, 42 N. J. L. 49; *Leary v. Meier*, 78 Ind. 393; *Gibbons v. Dayton*, 4 Hun (N. Y.), 451; *Glenn v. Thompson*, 75 Pa. St. 389; *Adams on Ejectment*, 142.

² *Parker v. Constable*, 3 Wils. 25; *Adams on Ejectment*, 143.

³ *Comyn's Digest Estates*, H. 1.

⁴ *Bouvier's Law Dictionary*, 573.

⁵ *Herrell v. Sizeland*, 81 Ill. 457 (1876).

⁶ *Dumm v. Rothurnel*, 112 Pa. St. 272; *Herrell v. Sizeland*, 81 Ill. 457; *Lestey v. Randolph*, 4 Raw. (Penn.) 123; *Ridgely v. Stillwell*, 25 Mo. 570; *Thomas v. Wright*, 9 Serg. & R. (Penn.) 87; *Clinton Wire C. Co. v. Gardner*, 99 Ill. 151.

from year to year, holding over after the expiration of the term constitutes the largest number of these tenancies.¹

A tenancy from year to year can not be created by an oral agreement to work land on shares for a term of five years, followed by occupancy of the land under the agreement for two years. *Unglish v. Marvin*, 8 N. Y. S. 283; 55 Hun (N. Y.), 45; 56 Hun (N. Y.), 644 (1890).

Tenants who enter into possession of demised premises under a void lease become tenants from year to year from the time of their entry, and the time of termination of their tenancy is not governed by the designation in the lease of the time in the year when the term shall expire. *Coudert v. Cohn*, 118 (N. Y.) 309; 23 N. E. Rep. 298 (1890).

Where lands are leased to a tenant for one year for a stipulated rent reserved, and after the expiration of the lease, the tenant without further contract remains in possession, and is recognized as a tenant by the landlord by the receipt of rent for another year, this will create a tenancy from year to year.

In such case the tenancy can only be terminated by the agreement of the parties express or implied, or by notice given of six calendar months, ending with the period of the year at which the tenancy commenced. *Critchfield v. Remaley*, 21 Neb. 178; 31 N. W. Rep. 687 (1888).

By agreement between M. and P., the former was to remain in possession of premises as tenant of the latter for the same rent he was paying P.'s grantor, which was \$300 per annum. No agreement for renting the premises to M. for any definite term was ever made, but it was understood that he would permanently occupy the premises in carrying on his business: *Held*, that M. was a tenant from year to year. *Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501; 34 N. W. Rep. 514.

Where one who holds under a lease for a year, with rent payable monthly, holds over after the expiration of his term, he becomes a tenant from year to year at the election of the landlord, and this though he may have given notice before the term expired that he did not want the premises another year. *Smith v. Bell*, 44 Minn. 524; 47 N. W. Rep. (1890).

§ 7. Implied Tenancies from Year to Year.—Implied tenancies from year to year depend wholly upon the presumption that it was the intention of the parties to create them; evidence may always be received to rebut such presumption, and show their real meaning.²

Where a tenant, under a lease for a year or years, or for a stated period, holds over, it will be construed as an implied agreement that he shall hold for a corresponding period upon the same terms as to rents and times of payment, unless there be some act of one or both the parties which rebuts

¹ *Clark v. Howland*, 85 N. Y. 204; *Mo.* 113; *Hull v. Meyers*, 42 Md. 416; *Clinton Wire C. Co. v. Gardner*, 99 *Thieband v. First Nat. Bk.*, 42 Ind. Ill. 151; *Stoppelcamp v. Mangeot*, 42 212; *Claff v. Paine*, 18 Me. 264. Calif. 316; *Languerenne v. Dougherty*, 35 Pa. St. 45; *Yates v. Kinney*, 19 Neb. 275; *Bircher v. Parker*, 40 Adams on Ejectment, 155.

the implication. *Pricket v. Ritter*, 16 Ill. 96; *Rowan v. Lytle*, 11 Wend. (N. Y.) 618; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660; 4 Kent's Com. 111-112.

Where a remainderman, on the death of the tenant for life, gave notice to the tenant in possession under a lease, granted by the tenant for life, but void against the remainderman, to quit at the end of six months, and subsequently to the giving of the notice, but before its expiration, received a quarter's rent, accruing after the death of the tenant for life, it was held that the previous notice to quit rebutted the presumption of a tenancy from year to year, raised by the acceptance of the rent. *Sykes v. —*, cited in *Right v. Darby*, 1 T. R. 161; *Adams on Ejectment*, 155.

So, also, where the rent is not paid and received, as between landlord and tenant, but upon some other consideration, no tenancy from year to year will be created. If the tenant hold such premises by a title or tenure, which is not supported by the custom of the manor, the receipt of the quit-rent from him by the landlord will not create a tenancy from year to year. *Right v. Bawden*, 3 East, 260; *Adams on Ejectment*, 155.

While a verbal lease of real property for a longer term than one year is void by the statute of frauds, so that neither party thereto can enforce its terms as against the other, yet if the lessee enter into possession of the property under the lease, remain longer than one year, and pay his rent to the lessor, who accepts the same, a tenancy from year to year is thereby created. *Rosenblat v. Perkins*, 18 Or. 156; 22 Pac. Rep. 598 (1889).

Where a tenant in tail received an ancient rent, which was but trifling when compared with the real value of the premises, and which had been reserved under a void lease granted by the tenant for life under a power, upon a special case reserved for the opinion of the Court of King's Bench, they intimated that a jury should be strongly advised not to imply a tenancy from year to year from such payment and receipt, although it would amount to such an acknowledgment of a tenancy at will as would require a demand of possession before ejectment could be maintained. *Roe v. Priedaux*, 10 East, 158; *Denn v. Rawlins*, 10 East, 261; *Adams on Ejectment*, 155.

§ 8. Tenancies from Year to Year—The Notice to Quit Under Statutes.—In nearly all of the States the notice necessary to terminate a tenancy from year to year is regulated by statutes. As an illustration we quote the statute of Illinois:

"In all cases of tenancy from year to year, sixty days' notice, in writing, shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last sixty days of the year."¹

A tenancy at will is held to be a tenancy from year to year, merely for the purpose of a notice to quit. A shorter notice (*e. g.* three months) will terminate the tenancy; but, in such case, where the holding is at a stated rent, the notice turns the tenancy at will into a tenancy from year to year, running from the expiration of the first notice; and imposes the necessity of giving a notice to quit of six months, terminating at a day in the year cor-

¹ R. S. Ill. 1889, 877, § 5; Laws Ill. 1861, p. 136, § 1; where a tenancy is from year to year an action of ejectment can not be maintained unless the tenant has had sixty days' notice to quit. *Herrell v. Sizeland*, 81 Ill. 457 (1876).

responding with the termination of the first notice, in order to warrant an ejectment; and the holding over upon the tenancy from year to year is at the former rent. Where a tenant holds over after such notice, without any new stipulation, the law implies an agreement that it should be at the former rent. *Bradley v. Coval*, 4 Cow. (N. Y.) 349.

A lease though void as to the term may make the holding a tenancy from year to year to be determined upon notice. *Thurber v. Dwyer*, 10 R. I. 355.

§ 9. **Tenant at Will—Defined.**—A tenant at will is one who is let into the possession of lands to hold at the will of the owner,¹ as for example, where a person takes possession under an agreement to purchase, and then refuses to comply with the conditions of the agreement.²

A tenant at will is entitled to emblements in all cases except where he terminates the tenancy himself.³ As a general rule he is entitled to notice to quit.⁴

If a person holding land in virtue of a parol gift, and who is consequently but a tenant at will, lease the land, and the donor merely permit the lessee to build and enjoy the term, the relationship of landlord and tenant is not created, and the lessee is not entitled to notice to quit. *Jackson v. Rogers*, 1 Johns. Cas. (N. Y.) 33; *S. C. 2 Caines' Cas.* (N. Y.) 314.

A tenancy from month to month without other limitation and determinable at the choice of either party to the lease is a tenancy at will, and so is a holding over pending negotiations for a renewal of the lease. The tenant is entitled to notice to quit, even if he holds over without paying. *Hilsendegen v. Scheich*, 55 Mich. 468.

A written demise without reservation of rent or named duration of term, creates a strict tenancy at will. *Amick v. Brubaker*, 101 Mo. 473; 14 S. W. Rep. 627 (1891).

The entry on land under a verbal contract to purchase makes the person in possession a tenant at will. *Hall v. Wallace*, 88 Cal. 434; 26 Pac. Rep. 360 (1891).

A wife's land was leased to a tenant, who was notified that his lien would not be extended on the old terms. The leasing of the premises was intrusted by the wife to her husband as her agent, and he leased to the tenant for a year at an increased rent. The tenant refused to accept a lease tendered by the wife. At the end of his first term, he paid a month's rent in advance, at the rate fixed in the lease made by the husband. The wife received the

¹ 12 Am. & Eng. Ency. 670. A mere gratuitous possession for life is a tenancy at will. *Sallabah v. Marsh*, 34 La. Ann. 1053.

² *Lyon v. Cunningham*, 136 Mass. 532; *Emmons v. Scudder*, 115 Mass. 367; *Herrell v. Sizeland*, 81 Ill. 457; *Lapham v. Norton*, 71 Me. 83; *Hillsendegen v. Schiech*, 55 Mich. 468.

³ *Debow v. Colfax*, 10 N. J. 128; *Morgan v. Morgan*, 65 Ga. 433.

⁴ *Wilson v. Prescott*, 62 Me. 115; *Coomber v. Hefner*, 86 Ind. 108; *Anderson v. Taylor*, 56 Calif. 131; *Shipman v. Mitchell*, 64 Tex. 174; *Bennett v. Robinson*, 27 Mich. 26; *Munson v. Plumber*, 59 Iowa, 120; *Larned v. Hudson*, 60 N. Y. 102; *Clark v. Wheelock*, 99 Mass. 114; *Hazelton v. Colburn*, 31 N. H. 460.

money, but it did not appear that she had notice of that lease. *Held*, that the acceptance of the month's rent did not create a tenancy on the terms fixed in the lease made by the husband, nor a tenancy from year to year, but a tenancy at will only. *Fall v. Moore*, 45 Minn. 515; 48 N. W. Rep. 404 (1891).

An instrument, in form a lease, purporting to lease premises for a certain time, providing for the payment of a certain rent per month, and that the lessor shall have a lien on the lessees' property on the premises in case the rent is not paid, and may take possession of the same as under a chattel mortgage, if not signed by the lessor as well as the lessees, makes the lessees tenants at will or by sufferance only, and gives the lessor no lien for rent after they have abandoned the premises. *Nicholls v. Barnes* (Neb.), 49 N. W. Rep. 342 (1891).

§ 10. Tenant at Sufferance Defined.—A tenant at sufferance is one who comes into possession of premises under a lawful title but holds over wrongfully after the expiration of the term;¹ as for example a lessee holding over after the expiration of a tenancy at will;² a mortgagor after a sale or condition broken.³ At the common law a tenant at sufferance is not entitled to emblements⁴ nor a notice to quit.⁵

B entered into possession, under an agreement for a conveyance, when the whole of the purchase money should be paid, and, in the meantime, to pay an annual rent of twenty-five bushels of wheat; B having paid rent for one year at least, becomes a tenant, and is entitled to notice to quit. *Jackson v. Niven*, 10 Johns. (N. Y.) 335; *Taylor on Landlord and Tenant*, 339.

Lessees, on holding over after the expiration of their lease, become tenants by sufferance. *Sutton v. Hiram Lodge*, 83 Ga. 770; 10 S. E. Rep. 585 (1890).

Where a tenancy at will is terminated by the execution of a lease of the premises to a third person, and converted into a tenancy at sufferance, the statutory liability of the tenant at sufferance for rent is to the lessee alone, and no judgment can be rendered in favor of the lessee and lessor as joint plaintiffs. *Cofran v. Shepard*, 148 Mass. 572; 20 N. E. Rep. 181 (1889).

§ 11. The Relation Once Established Presumed to Exist.—When the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant, immediately or remotely, and the party succeeding the tenant is as much

¹ 12 Am. & Eng. Ency. 668.

³ *Mason v. Gray*, 36 Vt. 311; *Kings-*

² *Smith v. Littlefield*, 51 N. Y. 541; *Iley v. Ames*, 2 Met. (Mass.) 29.

Emmes v. Feely, 132 Mass. 346; ⁴ *Milley v. Cheney*, 88 Ind. 466.

Brown v. Smith, 83 Ill. 291; *Mc-* ⁵ *Kinzie v. Wixom*, 39 Mich. 384.

Carthy v. Yale, 39 Calif. 585; *Robin-* But notice is sometimes required by
son v. Deering, 56 Me. 357; *Abeel* statutes. *Bennett v. Robinson*, 27

v. Hubbell, 52 Mich. 37; *Rusell v. Mich.* 26; *Jackson v. French*, 3

Fabyan, 34 N. H. 218; *Condon v. Wend.* (N. Y.) 337.

Barr, 47 N. J. L. 113.

affected by the acts and acknowledgments of his predecessor as though they were his own. He takes the estate as it existed in possession of his predecessor at the time of his taking.¹

§ 12. **Ending of the Term by Forfeiture.**—Anciently a forfeiture of an estate resulted from disloyal acts by the holder, whether owner or tenant, against the interest of the feudal lord. As for example, a feoffment by a tenant for life was held to be a forfeiture of his estate for the reason that it was an attempt to dispose of the reversion.² But in modern times the forfeiture of an estate results only upon the breach of some condition of the instrument creating the estate, as a default in the payment of rent, an attornment to a stranger, a denial of the landlord's title and the like.³

§ 13. **By Breach of Condition.**—A grantor or lessor may in creating a lesser estate impose any condition which is not illegal or repugnant to the grant. The grantee or lessee accepting the estate accepts it with the conditions imposed, and upon the breach by the grantee or lessee of any such conditions the estate becomes forfeited.⁴

The most usual conditions for the non-performance of which estates are declared forfeited, are conditions in restraint of alienation and waste,⁵ against underletting the premises,⁶ selling, assigning or disposing of the lease,⁷ covenants to insure buildings and to keep them insured,⁸ covenants to repair and keep in repair,⁹ etc.

§ 14. **Determination of a Tenancy by the Non-Payment of Rent.**—The right to terminate a tenancy by a notice to quit was given by the common law, and was necessarily incidental to a tenancy from year to year; the termination of a tenancy

¹ Jackson v. Davies, 5 Cow. (N. Y.) 123.

² 2 Blackstone's Com. 275; Stat. 8 & 9, Vict. 100; 8 Am. & Eng. Ency. 446.

³ 4 Kent's Com. 106; Nichols v. Eaton 91 U. S. 716; Broadway v. Adams, 133 Mass. 170; Anderson v. Carey, 36 Ohio St. 506; Chapman v. Wright, 20 Ill. 120; Jewett v. Berry, 20 N. H. 36; Saunders v. Freeman Dyer, 209; Machias Hotel v. Fisher, 56 Me. 321; 8 Am. & Eng. Ency. 446; Bac. Abr., Title, Leases.

⁴ Strathtub v. Lovejoy, 8 Gray (Mass.), 204; 2 Blackstone's Com. 281; 8 Am. & Eng. Ency. 444.

⁵ Verplank v. Wright, 23 Wend. (N. Y.) 506; Kidd v. Dennison, 6 Barb. (N. Y.) 9.

⁶ Field v. Mills, 33 N. J. L. 254; Roe v. Soles, 1 Maule & S. 279.

⁷ Jackson v. Silvernail, 15 Johns. Ch. (N. Y.) 278; Jackson v. Harrison, 17 Johns. Ch. (N. Y.) 66.

⁸ Doe v. Peck, 1 Barn. & A. 428.

⁹ Myers v. Burns, 35 N. Y. 269.

by the non-payment of rent, or the breach of a covenant or condition, arises only under express agreement, and seldom occurs but where the tenant has a written lease for a determinate period.¹

The different remedies which the landlord may pursue in the event of the non-payment of the rent, are (1), covenant, to recover the rent itself; and (2) ejectment, to recover the premises for the non-payment of the rent. The remedy by ejectment is but a mode of enforcing the right of re-entry; and the authority to assert it depends in part upon the provisions of the contract as well as upon the provisions of the common and statute law. It is founded upon the provision of the contract which gives the party the right to re-enter in the event of the want of a sufficient distress on the premises to satisfy the rent; and where a right of re-entry for non-payment of rent is not reserved, the landlord can not at common law maintain ejectment on that ground. *Tyler v. Heidorn*, 46 Barb. (N. Y.) 439.

It was shown on the trial that one Wells entered into possession of the premises in question, in March, 1824, as a tenant of the lessor of the plaintiff for one year, to work the same on shares. He held over. In May, 1825, the defendant entered under Wells, (Wells remaining in possession,) to work the land on shares, and on the fourteenth of the same month an ejectment was commenced against him. The plaintiff was nonsuited for the reason that the defendant was a mere cropper: that Wells was the real tenant, and, remaining in possession, the action should have been brought against him. A motion was made to set aside the nonsuit. By the court, Savage, Ch. J.: "The only question in the case is, whether the defendant was entitled to notice to quit. Wells entered into possession lawfully; he hired the premises for one year, and continued in possession after that period; he was tenant from year to year, and was entitled to notice before an ejectment could be brought against him. The defendant coming in under Wells, stands in the same relation to the lessor. A tenant for a year, holding over, is tenant from year to year, and not at will; but if at will, he was entitled to notice. We therefore refuse to set aside the nonsuit." *Jackson v. Salmon*, 4 Wend. (N. Y.) 327.

§ 15. **The Entry at Common Law.**—An actual entry upon the lands was formerly necessary before an ejectment could be maintained, and that the claimant's title must be of such a nature as to render his entry lawful. When, therefore, a lease for years was granted to the tenant, and the right of possession thereby transferred to him, the landlord could not legally enter upon the land during the continuance of the term, and was consequently without remedy to recover back his possession while the term lasted, although the tenant should neglect to render his rent, or otherwise disregard the conditions

¹ *Adams on Ejectment*, 182; *Morwick v. Parker*, 44 Ill. 326; *Cunrill v. De La Granja*, 99 Mass. 383; *ningham v. Holton*, 55 Me. 33; *Hen-Pardee v. Gray*, 66 Calif. 524; *Chad-dricksen v. Belson*, 21 Neb. 61.

of his grant. When terms for years increased in length and value, this became a serious evil to landlords. The tenant might be so indigent as to render an action of covenant upon the original lease altogether useless, and the premises might be left without a sufficient distress to countervail an arrear of rent. As a means of obviating these difficulties, it became the practice for landlords to insert in their leases a proviso declaring the lease forfeited, if the rent remained unpaid for a certain time after it became due, or if any other particular covenant of the lease were broken by the lessee, and empowering the landlord in such cases to re-enter upon and re-occupy his lands.¹

§ 16. **What Conditions Are Valid in Law.**—The landlord, having the *jus disponendi*, may annex whatever conditions he pleases to grant, provided they be neither contrary to the laws of the State, nor to the principles of reason, or public policy; and it is by these general maxims that our courts must be guided, when called upon to consider the validity of any particular covenant or conditions in a lease.²

A condition in a lease not to sell or dispose of any wood or timber off of the demised premises, without permission, in writing, from the landlord, is a good and valid condition, and a breach thereof works a forfeiture of the estate. *Verplanck v. Wright*, 23 Wend. (N. Y.) 506.

A lease was for twenty-one years, and the proviso that the landlord might re-enter if the tenant became bankrupt. This proviso was holden valid, upon the principle, that, as it is reasonable for a landlord to restrain his tenant from assigning, so it is equally reasonable for him to guard against such an event as bankruptcy, for the consequence of bankruptcy would be an assignment; and that such a proviso is not contrary to any express law, nor against reason or public policy, for it is a proviso which can not injure the creditors, who would not rely on the possession of the land by the occupant without a knowledge also of the interest he had therein; and to discover this they must look into the lease itself, where they would find the proviso that the tenant's interest would be forfeited in case of bankruptcy. *Buller, J.*, made a distinction between leases for short terms, and very long leases, with respect to provisos of this nature; because if they were to be inserted in very long leases, it would be tying up property for a considerable length of time, and be open to the objections of creating a perpetuity. It was a stipulation not against law, but merely against the act of the lessee himself, which it was competent for the lessor to make. *Roe v. Galliers*, 2 T. R. 133; *Adams on Ejectment*, 185.

Where a lease contains a covenant against waste, and also a clause of re-entry for a breach of covenants, if the lessee or his assigns commit waste, the lessor may bring ejectment. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227.

¹ *Adams on Ejectment*, 183.

² *Adams on Ejectment*, 184.

§ 17. **Subtilities of Distinctions of the Common Law Abolished.**—The preliminaries required by the common law, before a landlord could bring an ejectment upon a clause of re-entry for non-payment of rent, were so numerous, as to render it next to impossible for any, unversed in the practice of the courts, to take advantage of a proviso of this nature. First, a demand of the rent must have been made, either in person, or by an agent properly authorized. Secondly, the demand must have been of the precise rent due; for if he demand it a penny more, or less, it was insufficient. Thirdly, it must have been made precisely upon the day when the rent was due, and payable, by the lease, to save the forfeiture; as, where the proviso was, “that if the rent shall be behind and unpaid, by the space of thirty, or any other number of days after the day of payment, it should be lawful for the lessor to re-enter,” a demand must have been made on the thirtieth, or other last day. Fourthly, it must have been made a convenient time before sunset. Fifthly, it must have been made upon the land, and at the most notorious place of it. If there was a dwelling-house upon the land, the demand must have been made at the front door, though it was not necessary to enter the house, notwithstanding the door was open; but if the tenant met the lessor, either on or off the land, at any time of the last day of payment, and tender the rent, it was sufficient to save a forfeiture, for the law leans against forfeitures. Sixthly, unless a place was appointed where the rent was payable, in which case the demand must have been made at such place. Seventhly, the demand of the rent must have been made in fact, although there was no person on the land ready to pay it.¹ These preliminaries were modified or abolished by the Statute of 4 Geo. II, c. 228, S. 2, and as a general rule are abolished in the American States.

According to the case of *Doe v. Paul*, 3 C. & P. 613, the demand ought to be made at the last hour of the day, at sunset. 1 Saund. 287 (n. 16).

Where, by a written agreement, A agreed to let, and B agreed to take premises for a term of years, “at and under the yearly rent of £80,” and the agreement contained several specific agreements by B to do certain things, but there was no specific agreement to pay the rent, and a power of re-entry was reserved in case of a breach of “any of the agreements therein

¹ Adams on Ejectment, 187; *Roe v. Davies*, 7 East, 363; *Doe v. Paul*, S. C., 3 C. & P. 613.

contained," it was held that the power extended to the non-payment of rent. *Doe v. Kneller*, 4 C. & P. 3; *Adams on Ejectment*, 198.

§ 18. **Forfeiture for Non-payment of Rent—The Rule at Common Law.**—It is a settled rule at the common law, that where a right of re-entry is claimed on the ground of forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due at a convenient time before sunset on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay.¹ Upon such a demand a re-entry may be made, if no sufficient distress is found upon the premises, by going thereon with witnesses, and declaring that for want of sufficient distress and non-payment of rent demanded, stating the amount for which he re-enters and possesses himself of the premises.² This rule of the common law has been abrogated in many States by statutory enactments and materially modified in others. We quote the statute of Illinois as an illustration.

SECTION 8. *Demand for rent.* The landlord or his agent may, at any time after rent is due, demand payment thereof, and notify the tenant, in writing, that unless payment is made within a time mentioned in such notice, not less than five days after the service thereof, the lease will be terminated. If the tenant shall not within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended, and sue for the possession under the statute relating to forcible entry and detainer, or maintain ejectment without further notice or demand.

Sec. 10. *Service of demand or notice.* Any demand may be made or notice served by delivering a written or printed, or partly written and printed copy thereof to the tenant, or by leaving the same with some person above the age of twelve years, residing on or in possession of the premises; and in case no one is in the actual possession of said premises, then by posting the same on the premises.³

The form of demand under this statute may be as follows:

To _____

YOU ARE HEREBY NOTIFIED, that there is now due _____ the sum of _____ dollars and _____ cents, being rent for the premises situated in the _____ of _____ in _____ County, in the State of Illinois, and known and described as follows, viz..

¹ Saund. 287, note 16, in which are (1843); *Chapman v. Kirby*, 49 Ill. 211; cited 1 Leon. 305; C. W. Eliz. 209; *Prout v. Roby*, 15 Wall. (U. S.) 522 Plowd. 172 b; 10 Rep. 129; Co. Litt., (1872).

201 b; 4 Leon. 117; 7 T. R. 117, and numerous other authorities; see also upon the same point: *Dev. ex dem. Wheeldon v. Paul*, 3 Cor. & P. 618; 14 Eng. Com. Law, 483; and *Roe ex dem. West v. Davis*, 7 East, 363; *Con-*

² *Johnson v. Harrison*, 17 Johns. Ch. (N. Y.) 66; *Bedford v. McElheran*, 2 Serg. & R. (Penn.) 50; *Rem. Dig., Rent, D.*, 5 a; *Bac. Abr., Rent*, H. 18; *Vin. Abr.* 482.

³ R. S. Ill. 1889, 877, §§ 9 and 10; *Laws, Ill.* 1865, 108, § 3.

AND YOU ARE FURTHER NOTIFIED, that payment of said sum so due, has been demanded of you, and that unless payment thereof is made on or before the——day of——A. D. 188—, your Lease of said premises will be terminated. ———is hereby authorized to receive said rent, so due, for——

Dated this——day of——A. D. 188—.

Landlord.

Where a power of re-entry is reserved for the non-payment of rent, if sufficient distress should not be found upon the premises, it is incumbent upon the landlord who seeks to enforce this right by ejectment to show that there was not sufficient property on the premises to pay the rent. *Newman v. Rutter*, 8 Watts (Penn.), 51.

To entitle the owner of a rent-charge to re-enter the demised premises, there must be a demand of the precise rent due, on the very day on which it becomes due, and on the most notorious place on the land; and this, although the land is vacant and uninclosed. The rule in this regard, is in Pennsylvania the same as at common law. *McCormick v. Connell*, 6 Serg. & R. (Penn.) 151.

If the tenant deny the holding altogether or forbids a distress, and provides the means of resisting it, and refuses to pay the rent, the landlord will not be required to make a regular demand at the precise time, and precisely conformable to the terms of the lease. *The Assignee Farley v. Craig*, 6 Halst. (N. J.) 262.

When the ancient practice prevailed, actual entries were made in these as in all other cases; and it seems also to have been necessary, for some years after the modern practice was invented, and the sealing of leases dispensed with, for landlords to make actual entries upon the lands before they could take advantage by ejectment of the forfeiture of a lease. This useless form is now abolished, but the right to make the entry is still necessary. *Little v. Heaton*, Salk. 358; S. C., Ld. Raym. 750; *Goodright v. Crater*, Doug. 477; *Anon.*, 1 Vent. 248; *Wither v. Gibson*, 3 Keb. 218; *Adams on Ejectment*, 184.

§ 19. Waiver of Forfeiture for Non-payment of Rent.—When a forfeiture has accrued upon a clause of re-entry for rent in arrear, such forfeiture will be waived if the landlord do any act after the forfeiture, which amounts to an acknowledgment of a tenancy still subsisting; as if he receives rent due at a subsequent quarter, or distrains for rent accruing after the forfeiture, or gives a receipt in which he calls the party his tenant.¹

To make a receipt for rent operate as a waiver of a forfeiture of the estate demised, the rent must not only be received after the forfeiture is incurred, but such rent so received must have accrued after that time. *Jackson v. Allen*, 3 Cow. (N. Y.) 220.

If the lessor is ignorant that a forfeiture has been incurred, acceptance of

¹*Jackson v. Sheldon*, 5 Cow. (N. Y.) 448.

rent is not a waiver of it. *Jackson v. Bronson*, 7 Johns. (N. Y.) 227; see *Coon v. Brickett*, 2 N. H. 163; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391; *Steadman v. M'Intosh*, 5 Ired. (S. C.) 571.

Where an ejectment was brought upon a proviso of re-entry for non-payment of rent, and the lessor also commenced an action of covenant for rent accruing subsequently to the day of the demise in the ejectment, and the tenant paid into court the rent demanded in the action of covenant, the forfeiture was holden to be waived; but it seems doubtful whether the commencement of the action of covenant was of itself sufficient to waive the forfeiture. *Doe v. Minshul*, B. N. P. 96; S. N. P. 650; *Adams on Ejectment*, 199.

It seems, according to the old authorities, that in the case of a lease for years, the bare acceptance by the lessor at a subsequent day of the rent, in respect of which the forfeiture accrued, although before ejectment brought, will not of itself, unless accompanied with circumstances which shows an intention to continue the tenancy, bar him of his right to re-enter because the rent is a duty due to him, and as well before as after re-entry, he may have an action of debt for the same on the contract between the lessor and lessee, but that in the case of a lease for life, the mere acceptance of such rent will be sufficient to affirm the lease, as the lessor could not receive it as due upon any contract, but must receive it as his rent, for when he accepted the rent he could not have an action of debt for it, but his remedy was by assize, if he had seizin or distress. *Green's case*, Cro. Eliz. 3; S. C. 1 Leon. 262; *Pennant's case*, 3 Co. 64; *Doe v. Batten*, Cowp. 243; *Adams on Ejectment*, 199.

§ 20. **Determination of Lease for the Non-performance of Conditions and Covenants.**—With respect to the construction of provisos for the determination of tenancies for the non-performance of covenants or conditions in the lease, no general principle can be laid down, excepting that which arises out of the maxim of the law, that every doubtful grant shall be construed in favor of the grantee, but no strained or forced interpretation shall be given to any covenant or condition, for the purpose of defeating its effect.¹ “Provisos of this sort,” said Lord Tenterden, “are not to be construed with the strictness of conditions at common law. These are matters of contract, and should be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort, the

¹ *Whitwell v. Harris*, 106 Mass. 532; *C. C. C. & I. R. Co.*, 45 Ind. 281; *Baker v. Werner*, 98 Pa. St. 555; *Buckner v. Warren*, 41 Ark. 532; *Crawley v. Mullins*, 48 Mo. 517; *Den v. Blair*, 15 N. J. L. 181; *Wells Adams on Ejectment*, 201; *Doe v. v. Sherer*, 78 Ala. 142; *Doty v. Bur-Elsom*, 1 M. & M. 189; *Brand v. dick*, 83 Ill. 473; *Ladd v. Wriggle*, 6 Trumveller, 32 Mich. 215; *Union v. Heisk.* (Tenn.) 620.

provisos ought to be construed according to fair and obvious constructions, without favor to either side.”¹

When a house was rented on condition of the continuous running of a saw mill, the abandonment by the tenant of the mill created an abandonment of the house at the option of the lessor. *Crawley v. Mullin*, 48 Mo. 517.

Where the lessee covenanted not to assign his term without the lessor's consent, and afterward devised his term without such consent, it was holden not to amount to a forfeiture, for a devise is not a lease. *Fox v. Swan*, Sty. 482; *Adams on Ejectment*, 201.

A covenant by a lessee not to assign the lease or underlet the premises without the lessor's consent is not broken by an involuntary sale of the leasehold under execution against the lessee. *Farnum v. Hefner*, 79 Cal. 575; 21 Pac. Rep. 955 (1889).

Where the lessee covenanted not to demise, assign, transfer, or set over, or otherwise do or put away the lease or premises, or any part thereof, and afterward made an under-lease of the premises, it was held not to be a breach of the covenant, for an under-lease is not an assignment. And it was said by the court, in answer to an argument, that although an under-lease did not amount to an assignment, yet that it was a transferring, setting over, doing, or putting away with the premises, that the devising a term was a doing or putting it away, so being in debt by confessing a judgment, and having the term taken in execution was the like, but that none of these amounted to a breach of the covenant. *Crusoe v. Bugby*, 3 Wils. 234; *Adams on Ejectment*, 202.

An agreement made by a lessee with a third person, to allow the business sign of the latter to remain upon the outside wall of the leased premises, in consideration of an annual payment, is a license, and not a lease, and does not constitute a breach of a covenant against underletting. *Lowell v. Strahan*, 145 Mass. 1; 12 N. E. Rep. 401 (1887).

A, having rented part of certain premises from B, who had no color of title except that of an occupant, and afterward renting the residue of the premises from C, the real owner, and B entering upon the premises, A instituted proceedings under the act of forcible entry and detainer, and regained possession from B: *Held*, that this determined the right of possession between A and B, and that henceforth B had no legal authority over the premises. *Thomas v. Black* (Del.), 18 Atl. Rep. 771 (1890).

A lease, by a tenant, of the demised premises for his entire term, is an assignment and not a sublease, though the rent reserved is different from that reserved in the original lease, and though the second lease provides for forfeiture and re-entry for condition broken, and for surrender of the premises upon expiration of the term. *Sexton v. Chicago Storage Co.*, 129 Ill. 318; 21 N. E. Rep. 920 (1889).

In New Hampshire, where a lease was given which contained a covenant that the lessee should pay certain rent and taxes, and should make no strip or waste, nor lease, nor underlet the premises without the consent of the landlord; and, further, that he might re-enter if the lessee failed in the payment of the rent and taxes, or if he committed waste: it was held, that

¹ *Doe v. Elsom*, 1 W. & M. 189.

an assignment of the lease was not a forfeiture, but merely gave the landlord a claim for damages. *Spear v. Fuller*, 8 N. H. 174.

Where a lessee for lives covenanted not to sell, dispose of, or assign his estate in the demised premises, without the permission of the lessor, etc., and the lease contained a clause of forfeiture for non-performance of covenants; held, that a lease of part of the premises by the lessee for twenty years, was not such a breach of the covenant; and that nothing short of an assignment of his whole estate, by the lessee, would produce a forfeiture of the lease. *Jackson v. Silvernail*, 15 Johns. (N. Y.) 278; *Jackson v. Groat*, 7 Cow. (N. Y.) 285.

Nor would a sale of the whole premises, under a judgment and execution against the lessee, work a forfeiture, there being no evidence of any fraud or collusion on the part of the lessee. *Jackson v. Silvernail*, 15 Johns. (N. Y.) 278.

So, where a lease, for the term of seven years, contained a like covenant, that the lessee "should not assign over, or otherwise part with the indenture, or the premises thereby leased, or any part thereof," etc., and there was a clause of re-entry for a breach of covenants; held, that no forfeiture was incurred by an underletting for two years. *Jackson v. Harrison*, 17 Johns. (N. Y.) 66.

The original lessor is not estopped to treat the second lease as an assignment by having refused to release his lessee from his liability for rent, or to accept the amount of rent reserved in the second lease, when he has not interfered with the assignee's possession of the premises. *Sexton v. Chicago Storage Co.*, 129 Ill. 318; 21 N. E. Rep. 920 (1889).

Covenant, "not to let, set, assign, transfer, set over, or otherwise part with the premises demised, or the lease," of a coffee-house, is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for beer supplied to the house. *Doe v. Hogg*, 4 Dowl. & R. 226.

Where the lease contained a proviso that the lessee should not let or assign over the whole, or any part of the premises, it was held that the lessee could not underlet without incurring a forfeiture; because the word *over* was annexed only to the word *assign*, and therefore the condition was broken, if the lessee let the premises, or any part of them, for any part of the time. *Roe v. Harrison*, 2 T. R. 425; *Adams on Ejectment*, 203.

If it be covenanted in a lease, "that, in case the lessee should suffer or permit more than one person to every hundred acres, to reside on, use, or occupy any part of the premises, the lease should be void," and the lessee lets part of the premises to persons, for a year, to cultivate for shares, in the proportion of more than one to each hundred acres, it is a breach of the condition, and defeats the lease. *Jackson v. Brownell*, 1 Johns. (N. Y.) 367; *Jackson v. Rich*, 7 Johns. (N. Y.) 194.

But, where the quantity of land demised was 135 acres, and a like covenant in the lease, it is not a breach for the lessee to permit another tenant besides him to occupy the premises. *Jackson v. Agan*, 1 Johns. (N. Y.) 273.

Where the proviso was not to assign, or otherwise part with the premises, for the whole, or any part, of the term, the proviso was held to be broken by an under-lease, as well as by an assignment. *Doe v. Worseley*, 1 Campb. 20; *Adams on Ejectment*, 203.

Where the covenant was not to set, let, assign, transfer, set over or

otherwise part with, the premises thereby demised, or that present indenture of lease, a deposit of the indenture with a creditor, as a receipt for money advanced, was held not to be a parting with it, within the meaning of the covenant. *Doe v. Laming*, 1 R. & M. 36; *Adams on Ejectment*, 203.

Where a lease contained a proviso for re-entry in case the tenant should demise or let the demised premises, or any part thereof, for all or any part of the term, the lessee agreed with a person to enter into partnership with him, and that he should have the use of certain parts of the premises exclusively, and of the rest jointly with him, the tenant, and accordingly let him into possession; it was held that the lease was forfeited, for that it was a parting with the exclusive possession of some part of the demised premises, and whether it were gratuitously or for rent reserved was immaterial. *Roe v. Sales*, 1 M. & S. 297; *Adams on Ejectment*, 203.

If the lease contain a covenant that the lessee shall not assign without the permission of the lessor, and the lessee do assign part of the premises with the consent of the lessor, it is not a surrender, but the lessee still remains liable for every act of the assignee amounting to a breach of the covenants contained in the lease. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227.

A covenant not to under-let any part of the premises without license, is not broken by taking in lodgers, for, as Lord Ellenborough said, "The covenant can only extend to such under-letting as a license might be expected to be applied for, and who ever heard of a license from a landlord to take in a lodger?" *Doe v. Laming*, 4 Campb. 77; *Adams on Ejectment*, 204.

Letting land upon shares for a single crop, does not amount to a lease of the land, and the owner alone can bring trespass. *Bradish v. Schenck*, 8 Johns. (N. Y.) 151.

A covenant not to "alien, sell, assign, transfer and set over, or otherwise part with the lease" of a public house, is not broken by depositing the lease with the brewers to cover advances by them. *Doe v. Bevan*, 3 M. & S. 353; *Adams on Ejectment*, 204.

Plaintiff's testator leased certain premises to defendants, who sub-let for a less term, and at a less rent, reserving certain privileges. Plaintiff's testator then notified the sub-lessees that defendants owed him rent, and that they should pay him what rent they might owe defendants, which they did. After the sub-lease expired, the sub-lessees continued in possession, and paid plaintiff the same rent they had paid under their lease from defendants, and plaintiff receipted to them for the rent, without any reference to defendants. Plaintiff at no time accepted the sub-lessees in the place of defendants: *Held*, that there was no surrender of the term. *Ballou v. Carton*, 54 Hun, 638; 8 N. Y. Sup. 15 (1890).

In ejectment on a clause of re-entry, in case the tenant should assign, set over, or otherwise let the premises, it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger. And such evidence would not be sufficient even if the tenant had covenanted not to part with the possession. *Doe v. Payne*, 1 Starkie's Rep. 86.

Where the lessee enters into covenants not to assign, etc., the court will distinguish between those acts which are done by him voluntarily, and

those which pass *in invitum*, and will not hold the latter to be a breach of the covenant. Adams on Ejectment, 204; Doe v. Payne, 1 Stark, 86.

If the lessee become bankrupt, and the term be assigned under the commission, no forfeiture will be incurred unless, indeed, there be an express stipulation in the proviso that it shall extend to the bankruptcy of the lessee. Doe v. Hogg, 1 C. & P. 160; Roe v. Galliers, 2 T. R. 133; Adams on Ejectment, 204.

Where a lease contains a proviso for re-entry if the lessor, "his executors or administrators, or either of them should become bankrupt," and the executor became bankrupt, it was held, that the proviso attached; Parke, B., said, that "where words are so clear, parties must be bound by their own express stipulation, however absurd." Doe v. Davies, 6 C. & P. 614; S. C. 5 Tyrr. 125; Adams on Ejectment, 205.

Where a lessee, who had covenanted not to "let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," with a proviso, that in such case the landlord might re-enter, afterward gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold, it was held to be no forfeiture of the lease, unless the warrant of attorney were given expressly for the purpose of having the lease taken; for judgments, in contemplation of law, always pass *in invitum*. Lord Kenyon said, "there was no difference between a judgment obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney; since the latter is merely to shorten the process, and lessen the expense of the proceedings;" but if the warrant of attorney be expressly given for the purpose of having the lease taken in execution, it will be held to be in fraud of the covenant, and a forfeiture of the lease. Doe v. Carter, 8 T. R. 57, 300; Adams on Ejectment, 204.

A lessor reserved one quarter of the money arising from every letting, assigning, or disposing of the premises by the lessee, who covenanted, that whatever he should incline, or be, by law or otherwise, obliged to sell, etc., he would make the first offer to the lessor, giving him notice of the price, etc.; and it was provided that every sale, renting, etc., should be void, and the premises revert to the lessor, unless the seller or purchaser should pay the lessor the one-fourth of the money offered, etc. The tenant who held under the lease confessed a judgment, on which an execution issued, and the lease was sold by the sheriff: held, that his was not a forfeiture, unless the judgment had been confessed fraudulently, or for the purpose of enabling the creditor to take the lease in execution under the judgment, and with a view to defeat the lessor's reservation of one-fourth of the money offered. Jackson v. Corliss, 7 Johns. (N. Y.) 531.

An under-lease, by the lessor of premises, for the whole unexpired term, reserving the right to re-enter, is held to be a sub-lease, and not an assignment, and the party giving the sub-lease can re-enter for a breach of the condition, although there is no reversion remaining in him. People v. Robertson, 39 Barb. (N. Y.) 9; Linden v. Hepburn, 3 Sandf. (N. Y.) 660; Doe v. Bateman, 2 Barn. & A. 160.

A covenant that the lessee shall not exercise the trade of a butcher upon the premises, is broken by selling there raw meat by retail, although no beasts were there slaughtered. Doe v. Spry, 1 B. & A. 617.

A proviso for re-entry if the lessee shall permit any person to inhabit

the premises who should carry on certain specified trades, (that of a licensed victualler not being one,) or any other business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants, is not broken by the opening of a public house. *Jones v. Thorn*, 1 Barn. & C. 715.

A covenant "not to use premises for the sale of pork," would, it seems, be broken by exposing carcasses of swine on the premises, and making bargains there for sale, although the carcasses be taken to other premises to be cut up, and the bills for the meat supplied be made out as from such other premises. The proviso was thus worded, that it should be lawful for the lessor to re-enter, "if any auction should be had on the premises, or use them for the sale of pork." It was objected that these words were ungrammatical and insensible; but Lord Tenterden said, that the proviso must be considered to have the same effect as if it had been expressed "in case the premises should be used for the sale of pork." *Coe v. Elsam*, 1 M. & M. 189.

A covenant, "not to permit any trade or business whatsoever," to be exercised upon the demised premises, is broken by an assignment to a schoolmaster, who kept his school upon the premises. *Doe v. Keeling*, 1 M. & S. 95.

Where a lease contained a covenant "to insure and keep insured a given sum of money upon the premises during the term, in some sufficient insurance office," the covenant was interpreted, by reasonable intendment, to mean insurance against fire; and the lessee, having insured the proper sum, but omitted to pay the annual premium within the time allowed by the office for payment, was held to have forfeited his lease upon a clause of re-entry, although he paid the premium within fourteen days after such time, and no action had been commenced, and no accident had happened by fire, to the premises, in the mean time. *Doe v. Sherwin*, 3 Campb. 134; *Doe v. Peck*, 1 B. & Ad. 428; *Rolfe v. Pitt*, 2 Price, 206, 212; *Bracebridge v. Buckley*, 2 Price, 200.

But where, in pursuance of a similar covenant, the lessee effected an insurance, the policy containing a memorandum that in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death, and died, and the representative, after the three months had expired, but before ejectment brought, obtained the proper indorsement, Lord Ellenborough was of opinion that the policy did not become void for want of the indorsement within the three months, but at most was only rendered voidable at the option of the company, and ruled that no forfeiture was incurred. *Doe v. Laming*, 4 Campb. 76; *Adams on Ejectment*, 208.

A covenant not to remove or grub up trees, is broken by removing trees from one part of the premises to another; and also by taking away trees, although the lessee plant a greater quantity than he takes away. *Doe v. Bird*, 6 C. & P. 195.

A covenant in a lease to deliver up at the end of the term, all the trees standing in an orchard at the time of the demise, "reasonable use and wear only excepted," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded. *Doe v. Crouch*, 2 Campb. 499.

A lease with a clause of re-entry, for non-performance of covenants, contained a general covenant on the part of the lessee, to keep the premises in repair, and also another independent covenant to repair, within three months after notice; the landlord, after serving the tenant with a notice to repair forthwith, was allowed to bring an ejectment within the three months, for a breach of the general covenant to repair. *Roe v. Paine*, 2 Canpb. 520; *Adams on Ejectment*, 208.

But where, on similar covenants, and with a similar clause of re-entry, the landlord gave a notice to repair within the three calendar months from the date of the notice, it was held that he had, by such notice, precluded himself from insisting on the forfeiture until the expiration of the three months. *Doe v. Meux*, 4 B. & C. 606; *Doe v. Brindley*, 4 B. & A. 84; *Adams on Ejectment*, 208.

A proviso giving power of re-entry if the tenant make default in performance of any of the clauses, by the space of thirty days after notice, does not apply to the breach of a covenant not to allow alterations in the premises, or permit new buildings to be made upon them without permission, and no forfeiture is incurred by the erection of a portico contrary to such covenant, and a neglect to remove it after notice. *Doe v. Marchetti*, 1 B. & Ad. 715; *Adams on Ejectment*, 209.

A proviso giving power of re-entry, if the lessee "shall do or cause to be done, any act, matter or thing contrary to and in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being an act done within the meaning of the proviso. *Doe v. Stevens*, 3 B. & Ad. 299; *Adams on Ejectment*, 209.

A covenant "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time, and it is for the jury to say, upon the evidence, whether the lessee has done what he reasonably ought in the performance of it. *Doe v. Sutton*, 9 C. & P. 706; *Adams on Ejectment*, 209.

The breaking of a door-way through the wall of a demised house into an adjoining house, and keeping it open for a long space of time, has been held to amount to a breach of covenant to repair. *Doe v. Jackson*, 2 Stark. 293.

So also pulling down a brick wall dividing two court-yards, has been held a breach of covenant "to repair and maintain the brick walls," etc. *Doe v. Bird*, 6 C. & P. 195.

But where the covenant was "to repair and keep in repair the premises, and also such buildings, improvements and additions as should be made thereon by the lessee," it was held, that no forfeiture was incurred by changing the lower windows into shop windows, stopping up a door-way, and making a new one in a different place; the covenant being only against non-repair, and it being implied by the terms of the lease, that additions or improvements were to be made. *Doe v. Jones*, 4 B. & A. 126; *Adams on Ejectment*, 209.

Where a lease contained a general covenant to repair, and a further covenant that if the lessee did not repair after notice, the lessor might enter and do the repairs himself, with right of distress for the amount of such repairs, and the lease also contained a proviso for re-entry upon breach of any covenant, and the lessor gave the lessee notice to repair the premises

within the period given by the lease, and that if he, the lessee, did not repair within such period, he, the lessor, would perform the repairs and charge the lessee with the expense, and the premises were not, in fact, repaired by either party; it was held, that the lessor having elected to perform the repairs and charge the lessee with the expense, could not proceed to recover the premises as on a forfeiture. *Doe v. Lewis*, 5 Ad. & Ell. 277.

A covenant for a landlord to be allowed to come into a house to see the state of repair at "convenient times," is not broken by his not being allowed to go into some of the rooms, if the tenant had no previous notice of his coming. *Doe v. Bird*, 6 C. & P. 195.

Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of £10, and the tenant pulled down some old buildings of more than £10 value, and substituted others of a different description, it was held that the waste contemplated in the proviso was waste producing an injury to the reversion; and that it was a question for the jury whether such waste had been committed. *Doe v. Bond*, 5 B. & C. 855.

Here the lease contained a proviso that the tenant should not carry any hay, etc., off the premises, under a certain penalty, and a clause followed, enumerating all the covenants except the above, and provided that upon breach of any of the covenants the lessor might re-enter; it was held, notwithstanding the penalty and the omission of the covenant in the enumeration, the clause of re-entry applied. *Doe v. Jepson*, 3 B. & Ad. 402; *Adams on Ejectment*, 211.

Where one of the conditions of the lease was, that the lessee should pay all taxes, etc., held, that the lessor had no right to re-enter for a breach of the condition, without showing a demand of payment of the tax within the period required by law, in order to create a forfeiture. *Jackson v. Harrison*, 17 Johns. (N. Y.) 66.

§ 21. Provisions for a Re-entry, etc.—Covenants and Conditions.—The lease must contain a provision for the re-entry of the landlord upon the breach of a covenant. This provision enables the lessor, his heirs or assigns, in case of a breach of the condition or covenant, to re-enter upon the demised premises and eject the tenant, leaving both parties in the same situation as if the lease had never been made.¹ But the grantor and his heirs, however, may still enter and take advantage of a breach of a *condition* or other common law forfeitures by ejectment without this clause.² The rule is different in case of the breach of a *covenant*; in the absence of the provision for a re-entry, the lessor's only remedy is an action for damages.³ In many States this distinction is

¹ *Smith v. Blaisdell*, 17 Vt. 199; ² *Fox v. Brissac*, 15 Calif. 223; 2 Johns v. Whitley, 3 Wils. 127; *Doe* Blackstone's Com., 155; *Den v. Post*, v. Phillips, 2 Bing. 13.

³ *Doe v. Watt*, 1 Mann. & R. 694; 2 Cro. 591; 11 Mod. 61; 1 Atk. 233. *Wigg v. Wigg*, 1 Atk. 383; *Taylor on Landlord & Tenant*, § 291.

abolished by statutes regulating the method of determining tenancies in cases of the failure of the tenant to comply with the provision of the lease.

A provision for a re-entry taken from an ordinary lease of lands:

And the party of the second part covenants with the party of the first part, that at the expiration of the term of this lease he will yield up the premises to the party of the first part without further notice, in as good condition as when the same were entered upon by the party of the second part, loss by fire or inevitable accident and ordinary wear excepted.

It is further agreed by the party of the second part, that neither he nor his legal representatives will underlet said premises or any part thereof, or assign this lease without the written assent of the party of the first part had thereto.

And it is further expressly agreed between the parties hereto, that if default shall be made in the payment of the rent above reserved, or any part thereof, or any of the covenants or agreements herein contained to be kept by the party of the second part, it shall be lawful for the party of the first part or his legal representatives, into and upon said premises or any part thereof, either with or without process of law, to re-enter and re-possess the same at the election of the party of the first part, and to distrain for any rent that may be due thereon upon any property belonging to the party of the second part. And in order to enforce a forfeiture for non-payment of rent it shall not be necessary to make a demand on the same day the rent shall become due, but the failure to pay the same at the place aforesaid or a demand and a refusal to pay on the same day, or at any time on any subsequent day, shall be sufficient; and after such default shall be made, the party of the second part and all persons in possession under him shall be deemed guilty of a forcible detainer of said premises under the statute.

§ 22. **Covenants and Conditions.**—Many of the rights and liabilities of both landlord and tenant arise out of the covenants between them. Some of these covenants are incidental to the relation of landlord and tenant and are obligations independent of positive stipulation, while others are the subject of express contract alone. Such rights may also be qualified or limited by some conditions annexed to the estate, which may either operate as a contract or terminate the estate according to circumstances.¹

A covenant is an agreement between two or more persons by an instrument under seal to do or not to do some particular thing. It can only be created by deed.²

¹ Taylor on Landlord and Tenant, Salk. 197; 1 Roll. Abr. 517; Day v. § 244. Brown, 1 Ham. (Ohio) 346; Coke on

² Taylor on Landlord and Tenant, Littleton, 230 b; Halsey v. Reed, 1 § 245; Rande v. C. & D. Canal Co., 1 Paige, Ch. (N. Y.), 446. Harr. (Del.) 253; Green v. Horne, 1

A condition is a qualification annexed to an estate by the grantor whereby the estate may be enlarged or defeated upon an uncertain event.¹

§ 23. **Forfeitures Under Agreement for Leases.**—The rules of law apply to a person holding the possession of lands under an agreement for a lease the same as if he were holding under a written lease where the agreement specifies the covenants and conditions to be inserted in the lease and that there shall be a re-entry for a breach of them.²

By a memorandum of agreement, in consideration of the rent and conditions thereafter mentioned, A was to have, hold and occupy, as on lease, certain premises therein specified, at a certain rent per acre. And it was stipulated that no buildings should be included or leased by virtue of the agreement; and it was further agreed and stipulated that A should take at the rent aforesaid, certain other parcels, as the same might fall in; and lastly, it was stipulated and conditioned that A should not assign, transfer or underlet, any part of the said lands and premises otherwise than to his wife, child or children. It was held, that by the last clause a condition was created, for the breach of which the lessor might maintain an ejectment. *Doe v. Watt*, 8 B. & C. 308.

But in an agreement to let, in which there was no clause of entry, the following stipulation was held to be a covenant, and not a condition operating in defeasance of the estate: "It is also hereby agreed, and clearly understood, that in case the said A. W., or his heirs, etc., should want any part of the said land to build or otherwise, or cause to be built, then the said T. R. or his heirs, etc., shall and will give up that part or parts of the said lands as shall be requested by the said A. W., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do." *Doe v. Philips*, 2 Bing. 13; *Adams on Ejectment*, 212.

§ 24. **Construction of Covenants for Re-entry.**—Provisos in leases for re-entry are construed strictly with respect to the parties who may take advantage of them, and only include the persons who are expressly named. A power for a person to enter will not extend to his executor. And it seems also, that if a lessee covenant with his lessor that he will not assign, etc., a covenant so framed will not extend to his executors or administrators, but if the executors or administrators be mentioned in the clause, they will be bound by it.³

¹ *Taylor on Landlord and Tenant*, § 271; 4 *Kent's Com.* 121; *Coke on Littleton*, 214 b. ³ *Adams on Ejectment*, 214; *Hassel v. Gowthwaite*, *Willes*, 500.

² *Doe v. Breach*, 6 *Esp.* 106; *Adams on Ejectment*, 212.

When a power of re-entry for breach of covenant is reserved, and a lease and the possession descends to co-parceners at common law, it seems that one alone can not maintain ejectment for breach of the covenant. *Doe v. Lewis*, 5 Ad. & E. 277.

Where a lease contained a covenant that the lessee, his executors or administrators (without mentioning assigns), should not underlet, and the lessee become bankrupt, and his assignees assigned the premises to a third person, who re-assigned to the bankrupt (having obtained his certificate), who underlet them, it was held that the lessee, having been discharged of all his covenants by his bankruptcy, the underletting by him was in the character of assignee, and, therefore, no forfeiture of the lease. *Doe v. Smith*, 1 Mars. 359.

§ 25. **Who May Take Advantage of the Forfeiture.**—The person who is entitled to the reversion of the estate at the time the forfeiture is committed, is, as a general rule, the party who may take advantage of the forfeiture.

To enable a reversioner to take advantage of a forfeiture, it is necessary that he should have the same estate in the lands at the time of the breach, as he had when the condition was created; and extinguishment of the estate in reversion, in respect of which the condition was made, extinguishing the condition also.¹

Where a lease was made for a hundred years, and the lessee made an under-lease for twenty years, rendering rent, with a clause of re-entry, and afterward the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term, it was holden that the grantee should not have either the rent, or the power of re-entry, for the reversion of the term to which they were incident was extinguished in the reversion in fee. *Thrur v. Barton*, Moore, 94; *Webb v. Russell*, 3 T. R. 393, 402; *Adams on Ejectment*, 213.

When the condition is, that the lessee will not do any particular act without leave from his lessor, if leave be once granted, the condition is gone for ever; for the condition is to be taken strictly, and by the license it is satisfied. *Dunpor v. Syms*, Cro. Eliz. 815; S. C., 4 Co. 119.

When a condition is entire, a license to dispense with a part of the condition is a dispensation of the whole. Thus, where a lease was made to three, on condition that neither they, nor any of them, should alien without license of the lessor, and the one by license aliened his part, and afterward the other two without license aliened their parts, it was adjudged the lessor could not enter, for the condition was dispensed with. *Dunpor v. Syms*, Cro. Eliz. 815; S. C., 4 Co. 119.

Where the lease contains a clause, that the lessee shall not assign without leave from his lessor, the lessee, under a license to assign part of the premises, may assign the whole without incurring a forfeiture. But the license must be such as is required by the lease; and therefore, where

¹ *Dunpor's case*, 4 Co. 120; *Adams on Ejectment*, 213; *Fenn v. Smart*, 12 East, 444.

the lease required the license to be in writing, a parol license was held to be insufficient. *Roe v. Harrison*, 2 T. R. 425; *Seers v. Hind*, 1 Ves. jun. 294; *Adams on Ejectment*, 214.

§ 26. **Forfeitures May Be Waived.**—Where a forfeiture has accrued upon a clause of re-entry for rent in arrear, the forfeiture will be waived if the landlord do any act after the forfeiture which amounts to an acknowledgment of a subsisting tenancy, as if he receives rent due at a subsequent quarter or under the old rule distrain for that in respect of which the forfeiture accrued.¹ It is curious to note the old rule of law in relation to a distress made for rent due and unpaid. The distress is only one mode given by law for the collection of a debt, but if the landlord insists upon collecting what is due him prior and up to the time of the forfeiture, he waives his right to insist upon the forfeiture. It does not appear to be good law, and yet Lord Coke said: "If the lessor distrains for the same rents for which the demand was made, he had thereby affirmed the lease, for after the lease determined he could not distrain for the rent."²

§ 27. **Waiver of the Forfeiture for Breaches of Condition.**—The forfeiture of a lease, by breach of a covenant or condition, may be waived in like manner as a forfeiture for non-payment of rent or a notice to quit; if the landlord do any act with knowledge of the breach which can be considered as an acknowledgment of a tenancy still subsisting; as for example, if he receives rent accruing subsequently to a forfeiture, unaccompanied by circumstances which show a contrary intention.³

Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave notice to repair within three months; held, that this was a waiver of the forfeiture incurred by breach of the general covenants to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months. *Doe v. Meux*, 4 Barn. & C. 606.

A landlord will not lose his right to re-enter, by merely lying by, however long the period, and witnessing the act of forfeiture; but it seems that if, with full knowledge thereof, he permits the tenant to expend money in improvements, it is a circumstance from which the jury may presume a waiver. *Doe v. Allen*, 3 Taunt. 78.

¹*Jackson v. Sheldon*, 5 Cow. (N. Y.) 448.

²*Penant's case*, 3 Co. Reps. 64; *Adams on Ejectment*, 160; *Coke on Littleton*, 211 b.

³*Adams on Ejectment*, 216; *Fox v. Swan*, Styles, 482; *Goodright v. Davids*, Cowp. 803; *Doe v. Pritchard*, 5 B. & Ad. 765.

§ 28. A Waiver of One Forfeiture Not a Waiver of a Second.—A waiver of one forfeiture incurred by breach of covenant, will not be a waiver of a second forfeiture incurred by another breach of the same covenant; nor where the breach is a continuing breach, will the landlord be precluded from taking advantage of it, by having received rent, etc., after the breach was originally committed. As for example, where a right of re-entry was reserved on a breach of covenant not to underlet, it was held that the lessor was entitled to re-enter upon a second underletting, although he had waived his right so to do upon the first, and where the forfeiture incurred was by using rooms in a house in a manner prohibited by the lease, it was held that such user was a continuing breach, and that the landlord might recover, after receiving rent, provided the user continued after such receipt.¹

Receiving rent is not a waiver of a breach of other covenants. *Blecker v. Smith*, 13 Wend. (N. Y.) 530.

Where a lease of coal mines reserved a certain rent, and contained a proviso that the lease should be void if the tenant should cease working at any time two years, and the tenant did cease working two years, and then paid rent, but did not resume the working; it was held that this was a continuing breach, and that ejectment might be maintained for the ceasing to work after the payment of the rent. *Doe v. Banks*, 4 B. & A. 401.

§ 29. The General Rule.—As a general rule of law a forfeiture may be waived by any act or word amounting to an estoppel,² as for example the acceptance by the landlord of rent after he has knowledge of the forfeiture.³

§ 30. Forfeiture of the Tenancy for Illegal Uses of the Premises.—We have seen if the premises demised are used in such a manner as to violate any of the provisions of the lease, such use is a cause of forfeiture and the tenancy may be terminated.⁴ An immoral or illegal use of the premises is a like cause of forfeiture and will justify the landlord in terminating the tenancy.⁵ Voluntary waste committed by a tenant

¹ Adams on Ejectment, 216.

⁴ *Wheeler v. Earle*, 5 Cush. (Mass.)

² *Hunter v. Osterhand*, 11 Barb. 31; *Farewell v. Easton*, 63 Mo. 446; (N. Y.) 33; *Lash v. Druse*, 4 Wend. 313; *Alexander v. Hodges*, 41 Mich. 691; (N. Y.) 313; *Ward v. Day*, 33 L. J. 544; *Bray v. Foyarty*, 4 Ired. Eq. (N. C.) Q. B. 254; *Bowman v. Foot*, 29 Conn. 331; *Chapman v. Kirby*, 49 Ill. 211.

³ *McGlynn v. Moore*, 25 Calif. 384; *Prescott v. Kyle*, 103 Mass. 381; *Crafton v. State*, 25 Ohio St. 249; *People v. McCarthy*, 62 How. Pr. (N. Y.) 152; *Cohen v. Dupont*, 1 Sandf. (N. Y.) 260.

⁵ *Watson v. Fletcher*, 49 Ill. 498; *Ireland v. Nichols*, 46 N. Y. 413.

is as a general rule in most of the States such an illegal use of the premises as will justify the landlord in declaring a forfeiture,¹ but the rule is not universal when it is not made a condition of the lease.²

§ 31. The Right to Re-enter for a Condition Broken Operates Only During the Term.—A proviso in a lease to re-enter for a condition broken operates only during the term, and can not be taken advantage of after its expiration. As for example, where a lease for ninety-nine years, if A and B should so long live, was granted, with a proviso giving the power of re-entry, in case the lessee should underlet the premises for the purpose of tillage, and an under-tenant of the lessee ploughed up and sowed the land, but the lessor did not enter during the continuance of the estate; it was held in an action of trespass by the lessor against the under-tenant, for entering upon the land after the determination of the estate, for the purpose of carrying off the emblements, that the plaintiff having never been in possession by right of re-entry for condition broken, could have no advantage thereof, and that the defendant, who ploughed and sowed the land, was entitled to take the emblements.³

§ 32. Enforcing Forfeitures.—The mode of enforcing forfeitures is in general regulated by statutes, providing that when a default is made in any of the conditions of a lease, the tenancy may be determined by giving the tenant a notice; that in consequence of his default in the performance of the conditions in question, stating the same with reasonable certainty, the landlord has elected to determine the tenancy, at the same time notifying the tenant to deliver up the possession within some legal time to be stated in the notice. The form of the notice and demand are sometimes though not always prescribed in the statutes.

The Illinois statute prescribes the following form of notice:

To A. B. You are hereby notified that in consequence of your default in (here insert the character of the default) of the premises now occupied by you, being, etc. (here describe the premises), I have elected to determine

¹Rodgers v. Rodgers, 11 Barb. (N. Y.) 595; Stetson v. Day, 51 Me. 434; (Ky.) 284.

McDonald v. Elfe, 1 Nott. & M. (S. C.) 501. ³Adams on Ejectment, 220; Johns v. Whitley, 3 Wils. 127.

²Ballenbacker v. Fritts, 98 Ind.

your lease, and you are hereby notified to quit and deliver up possession of the same to me within — days of this date.

(Dated, etc.)

C—— D——,
Landlord.

§ 33. **Notice to Quit and Demand for Possession.**—The most usual method of determining a tenancy is by a demand for possession or notice to quit. The statutes of most of the States fix the time of the notice and the manner in which it is to be given, or the demand made, which must prevail in the absence of a special agreement as to the notice required.¹ The subject of notice to quit and demand for possession will be found discussed in the chapter on adverse possession, so far as it is required to render a possession adverse.

A notice to quit is not necessary where the relation of landlord and tenant does not exist. *Jenkins v. Robinson*, 4 Wend. (N. Y.) 436; *Den v. Adams*, 7 Halst. (N. J.) 99; *Adams v. Buford*, 6 Dana (Ky.), 408.

Where A, by his attorney, executed a lease to B for three years, and after the expiration of the term B applied to the attorney to know if he was authorized by A to enter into a new agreement, and the attorney replied that he was not, but said that B might continue in possession of the premises until he heard from A; *held*, that B was, after the expiration of the term, a mere tenant at sufferance, and not entitled to notice to quit previous to the bringing of an action of ejectment. *Jackson v. Parkhurst*, 5 Johns. (N. Y.) 128.

A servant or bailiff in the possession of lands, is not entitled to a notice to quit. *Jackson v. Sample*, 1 Johns. Cas. (N. Y.) 231.

A person claiming to hold land in fee is not entitled to notice to quit. *Jackson v. Deyo*, 3 Johns. (N. Y.) 422.

Where the term has been forfeited, notice to quit is not necessary. *Lane's Lessee v. Osment*, 9 Yerg. (Tenn.) 86.

Where a lease is to expire at a time certain, a notice to quit is not necessary, in order to recover in ejectment. *Bedford v. McElherron*, 2 Serg. & R. (Penn.) 49.

To entitle the defendant to notice to quit, there must be a privity either of contract or of estate between the lessor and the defendant. *Jackson v. Fuller*, 4 Johns. (N. Y.) 215.

There must be a tenancy, or existing relation of landlord and tenant. *Jackson v. Deyo*, 3 Johns. (N. Y.) 422; *Jackson v. Aldrich*, 13 Johns. (N. Y.) 106.

¹ See Notice to Quit, under Adverse 324; *Witt v. New York*, 5 Robb (N. Possession; *Clapp v. Paine*, 18 Me. Y.), 248; *People v. Paulding*, 22 Hun 264; *Detroit Bk. v. Bellamy*, 49 Mich. (N. Y.), 91; *Williams v. Ackerman*, 317; *Warner v. Hale*, 65 Ill. 395; 8 Oreg. 405; *Dunn v. Rothermel*, 112 Coombs v. Hefner, 86 Ind. 108; Pa. St. 272; *Right v. Darby*, 1 T. R. Stoppelkamp v. Mangeot, 42 Calif. 316; 159; *Axley v. James*, 13 Mees. & W. Grunewold v. Schaalcs, 17 Mo. App. 209.

If a person holding under adverse title, make application to the lessor of the plaintiff to be deemed his tenant, there is no tenancy created, and he is not entitled to notice. *Jackson v. Cuerden*, 2 Johns. Cas. (N. Y.) 253.

Where the defendant had originally entered adversely, a permission by one of the lessors of the plaintiff to continue in possession, and a disclaimer by the defendant to hold adversely, will not constitute him tenant so as to entitle him to notice to quit. *Jackson v. Tyler*, 2 Johns. (N. Y.) 444.

Notice to quit is necessary in all cases of uncertain tenancy. *Den v. Drake*, 2 Green, 523.

A lessee who has taken possession of more land than he was entitled to by his lease, and rent has been paid and received for the entire premises in his possession, becomes tenant from year to year, and the lessor can not bring ejectment for the land not included in the lease without showing a notice to quit. *Jackson v. Wilsey*, 9 Johns. (N. Y.) 267.

Tenant dies intestate in possession of certain premises. His widow, after continuing to occupy for several years, paying rent to the landlord, marries a second time, and her husband enters into possession and pays rent for several years to the landlord; and upon the death of the wife, the personal representative of the first husband obtains administration of his estate and effects, and brings ejectment to evict the second husband; *held*, that the action was maintainable without giving a formal notice to quit. *Doe v. Bradbury*, 2 Dowl. & R. 706.

Under Pub. St. Mass. c. 175, providing a summary process to recover possession of land, a notice to quit, addressed to two co-tenants, and served on one of them on the premises occupied by both, is properly served. *Grundy v. Martin*, 143 Mass. 279; 9 N. E. Rep. 647 (1887).

Gen. St. Minn. c. 75, § 40, providing for the determination of estates at will on three months' notice, applies to tenancies from year to year, except that, in the case of a tenancy from year to year, the notice to quit must still terminate at the end of a year. *Hunter v. Frost* (Minn.), 49 N. W. Rep. 327 (1891).

A notice by a landlord to his tenant to move "on or before" the date when the lease expires is not a continuing offer to accept a surrender of the existing lease whenever the tenant elects to make it, but simply means that the landlord will insist on his legal right to have the tenant move out before the last day of the term. *Koehler v. Scheider*, 29 N. Y. St. Rep. 364; 10 N. Y. Sup. 101 (1890).

The written notice of a grantee in a conveyance of land to a person in possession thereof under a lease as a tenant at will from a prior grantor is not the act or admission of the immediate grantor, if made and given without the direction or knowledge of such grantor. *Dunn v. Jaffray*, 36 Kan. 408; 13 Pac. Rep. 781 (1887).

Where a tenant is in possession under an indefinite monthly renting, and pays his rent in advance, the most that can be inferred, as to any agreement on the subject of notice to terminate, is that a reasonable notice should be given. *Ludington v. Garlock*, 55 Hun, 612; 9 N. Y. Sup. 24 (1890).

A charge to the jury in an action of ejectment that they would determine whether or not the tenants of the land in question were holding under lawful authority, or as tenants under the plaintiff, and, if the latter, that the

action would not lie if no notice to quit had been given, or demand of possession made, is correct. *Logan v. Quigley* (Pa.), 11 Atl. Rep. 92 (1887).

If a lease for a term certain, rent payable monthly, gives the lessee the option to "continue to occupy by the month," after the expiration of the term, "by complying with the above agreement," continued occupation by the tenant after the term will create a tenancy from month to month, to terminate which the notice applicable to such tenancy must be given. *McDevitt v. Lambert*, 80 Ala. 536; 2 So. Rep. 438 (1887).

Where a city granted land to a railroad company upon conditions as to the use of the land which were not complied with, and afterward another railroad company took possession of the same, the city, which had a clear legal title to the land except as affected by such grant, could maintain an action against the latter company for such land without a previous demand. *Georgia Railroad & Banking Co. v. City of Macon*, 86 Ga. 585, 13 S. E. Rep. 21 (1890).

Where the defendant in ejectment has not entered into possession under the plaintiff or by his consent, so that there is no relation of landlord and tenant, nor any privity between them, but each claims adversely to the other, no demand of possession or notice to quit is necessary before action brought. *Schoonmaker v. Doolittle*, 118 Ill. 607 (1886).

Where a sub-lessee who has become the tenant at will of the original lessors refuses to pay rent, and denies the original lessors' title, asserting title in himself under the sub-lease, the original lessors can treat the tenancy as terminated without notice to quit, and may oust the tenant. *Appleton v. Ames*, 150 Mass. 34; 22 N. E. Rep. 69 (1889).

Where the plaintiff has been in possession of land for seven years under a contract of purchase, when defendant enters on the land, claiming under a prior contract of purchase, no demand by plaintiff is necessary to make defendant's possession tortious. *Connolly v. Hingley*, 82 Cal. 642; 23 Pac. Rep. 273 (1890).

Where a tenant enters upon land and subsequently denies his landlord's title, held, that he is not entitled to notice to quit. *Ramsey v. Henderson*, 91 Mo. 560; 4 S. W. Rep. 408 (1887).

Where a defendant in ejectment repudiates a tenancy and claims a title in fee, he dispenses with the necessity of a notice to quit. *McGinnis v. Fernandes*, 126 Ill. 228; 19 N. E. Rep. 44 (1889).

A tenant at will who claims the premises as his own and deeds them to a third party, and whose answer in ejectment denies the lessor's right, can not claim that he is entitled to notice to quit because he is still a tenant at will. *Simpson v. Applegate*, 75 Cal. 342.

While a mere agreement to give a lease at a future date does not create the relation of landlord and tenant, or give to the party with whom it is made a right to the possession, yet, when the owner permits another to go into possession under an agreement for a lease, a tenancy is created between the parties which entitles the person in possession to notice to quit before the owner can sue for possession of the land. *Neppach v. Jordan*, 15 Or. 308; 14 Pac. Rep. 353 (1887).

§ 34. **Entry Under a Contract for a Lease.**—Where a party has put another into possession, with a view to a future tenancy or purchase, or under circumstances of a similar nature, although

he may have done no act acknowledging a regular tenancy, he can not afterward eject him without a demand of possession, unless some wrongful act has been done by such party determining his lawful possession.¹

Where a party was let into possession under an agreement for the purchase of the land and had possession formally given to him, and paid part of the purchase money, and there was no default on his part, a demand of possession was held necessary. *Doe v. Boulton*, 6 M. & S. 148; *Right v. Beard*, 13 East, 210; *Adams on Ejectment*, 153.

And where it was agreed that A should sell to B certain premises, if it turned out that he had a title to them, and that B should have immediate possession, A was not permitted to maintain ejectment against B without a demand of possession, although the object of the action was to try the title to the premises. *Doe v. Jackson*, 1 B. & C. 448; *Adams on Ejectment*, 154.

Where a tenant, whose lease had expired, continued in possession, pending a treaty for a further lease, although no tenancy from year to year was created by such possession and negotiation, the landlord was thereby precluded from recovering in ejectment, upon a demise anterior to the determination of the treaty. *Doe v. Stennet*, 2 Esp. 716; *Adams on Ejectment*, 154.

And when a party is admitted into possession under an invalid lease or agreement, the landlord must demand possession, or in some other manner determine the tenancy, before he can maintain ejectment, although he has not acknowledged the party as his tenant. *Goodtitle v. Galloway*, 4 T. R. 680; *Clayton v. Blakey*, 8 T. R. 3; *Thunder v. Belcher*, 3 East, 449; *Doe v. Browne*, 8 East, 165; *Hegan v. Johnson*, 2 Taunt. 148; *Adams on Ejectment*, 154.

But where the vendor of a term, after payment of part of the purchase money, let the purchaser into possession upon an agreement that the purchaser should have possession of the premises until a given day, paying the reserved rent in the meanwhile, and that if he should not pay the residue of the purchase money on that day, he should forfeit the installments already paid, and not be entitled to an assignment of the lease, and the purchaser failed to complete the purchase at the appointed day, it was ruled that an ejectment might be maintained without even a demand of possession, the purchaser having, by his own act, determined his interest in the premises. *Doe v. Sayer*, 3 Camp. 8; *Doe v. Lawder*, 1 Stark. 308; *Adams on Ejectment*, 154.

Where a man, having obtained possession of a house without the landlord's privity, afterward entered into a negotiation with him for a lease, which failed, the same rule of construction seems to have prevailed and notice was necessary. *Doe v. Quigley*, 2 Camp. 505; *Adams on Ejectment*, 154.

And where, upon an agreement for a sale to be completed by a certain day, the intended purchaser agreed with A to let the premises to him, to commence from that day, and A was let into possession prior to that day by

¹ *Thomas v. Wright*, 9 Serg. & R. (Penn.) 88; *Adams on Ejectment*, 153.

the permission of the intended seller, and the party failed to complete his purchase, A. was held not entitled to a demand of possession before ejectment brought, his possession being only the possession of that party by anticipation. *Doe v. Boulton*, 6 M. & S. 148; *Adams on Ejectment*, 154.

§ 35. **When a Notice is not Necessary.**—A notice to quit is not necessary when the relation of landlord and tenant does not exist,¹ or when the tenant sets up a title adverse to his landlord, either in himself² or in another person³ or attorns to an adverse claimant or colludes with him to deliver the possession,⁴ or where the tenant injures the premises by committing voluntary waste, as by cutting timber,⁵ or holds over after the termination of his lease against the will of his landlord,⁶ for in these cases the possession becomes wrongful and the landlord may recover it by an action of ejectment from the tenant or from any person who has received the possession from or through him.⁷

When a lease stipulates that the tenant shall pay a month's rent in advance, he has no rights under the lease until the rent is paid, and the landlord may eject him by an action before a justice, under R. L. Vt. § 1321, without demand for rent in arrear, or notice to quit. *Horan v. Thomas*, 60 Vt. 325; 13 Atl. Rep. 567 (1888).

Where a tenant at will buys the undivided interest in the land of one of the heirs of his landlord, his denial of the interests of the grantee of another heir is an ouster of his co-tenant, which amounts to a claim of adverse ownership, and his tenancy may thereupon be treated as at an end without the notice to quit, required by Rev. St. Mo. 1889, § 6371. *Amick v. Brubaker*, 101 Mo. 473; 14 S. W. Rep. 627 (1891).

No demand for rent is necessary before eviction, under a lease providing that if the rent reserved, or any part thereof, shall be unpaid when due, the lessor may declare the term ended, and repossess the premises, without making demand for rent or giving notice of forfeiture. *Lewis v. Hughes*, 12 Colo. 208; 20 Pac. Rep. 621 (1889).

§ 35a. **When the Notice Is Not Required—Disclaimer by Tenant.**—If the tenant set his landlord at defiance, or do any act disclaiming to hold of him as tenant, as for instance, if he

¹ *Jackson v. Aldrich*, 13 Johns. (N. Y.) 107; *Jackson v. Robinson*, 4 Wend. (N. Y.) 436. ⁵ *Philip v. Covert*, 7 Johns. (N. Y.) 1 (1810).

² *Brown v. Keller*, 32 Ill. 152 (1863). ⁶ *Ellis v. Paige*, 1 Pick. (Mass.) 43 (1822); *Jackson v. Rogers*, 2 Cai. Cas. (N. Y.) 314 (1805); *Secor v. Pestana*, 37 Ill. 525 (1865).

³ *Fortier v. Ballance*, 5 Gill. (Ill.) 46 (1848); *Fusselman v. Worthington*, 14 Ill. 135 (1852); *Bates v. Aveston*, 2 Mar. 270. ⁷ *Woodward v. Brown*, 13 Pet. (U. S.) 1 (1839); *Brown v. Keller*, 32 Ill. 152 (1863).

⁴ *Ballance v. Fortier*, 3 Gill. (Ill.) 291 (1846).

attorn to some other person, no notice to quit will be necessary; for in such case the landlord may treat him as a trespasser.¹ Under the English law this species of disclaimer was limited to tenancies from year to year. A tenant for a definite number of years did not forfeit his term by refusing to pay rent, and claiming the fee as his own. But when a tenant, after deserting the premises, delivered up the possession of them with the lease to a party who claimed by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold *bona fide* under the lease, the term was held to be forfeited by the act of betraying possession.²

A disclaimer by the tenant, dispenses with the necessity of a notice to quit. *Jackson v. Wheeler*, 6 Johns. (N. Y.) 272; *Bates v. Austin*, 2 A. K. Marsh. (Ky.) 270; *Ross v. Garrison*, 1 Dana (Ky.), 35; *Tuttle v. Reynolds*, 1 Vt. 80.

See *Currier v. Earl*, 1 Shepl. (Me.) 216; *Hall v. Dewey*, 10 Vt. 593; *Tillotson v. Doe*, 5 Ala. 407; *Farrow v. Edmunson*, 4 B. Mon. (Ky.) 605; *Wilson v. Smith*, 5 Yerg. (Tenn.), 379; *Greene v. Munson*, 9 Vt. 37; *North v. Barnum*, 10 Vt. 220; *Hockenbury v. Snyder*, 2 Watts & S. (Penn.) 240; *Willison v. Watkins*, 3 Pet. (U. S.) 49; *Montgomery v. Craig*, 3 Dana (Ky.), 101.

The reply of a tenant to a demand for rent, "you are not my landlord," accompanied by a refusal to give up possession, has been held to amount to a disclaimer. *Doe v. Long*, 9 C. & P. 773; *Adams on Ejectment*, 156.

So also to a similar demand by an agent, "my connection with J. C. as tenant has ceased for many years," has been held sufficient evidence of an antecedent disclaimer. *Doe v. Grubb*, 10 B. & C. 816; *Adams on Ejectment*, 156.

Where the legal estate was in trustees, and the tenant had paid rent to the *cestui que trust*, who had given notice to quit, on the receipt of which notice the tenant had said, "he did not think she would turn him out of possession, as she had promised he should continue on as tenant from year to year," the court held, that assuming the defendant to be tenant to the trustees, there was a sufficient disclaimer to entitle them to recover without notice, and that if he was tenant to the *cestui que trust* the notice was sufficient. *Doe v. Evans*, 9 M. & W. 48; *Adams on Ejectment*, 156.

Defendant, when served with notice, as plaintiff's tenant, to quit at the end of the current period, said to the agent: "It does not make any difference to me. I am not here under him. I am here under another man." *Held*, that this was a repudiation of the landlord's title, and that an action of ejectment would lie against him without waiting for the expiration of his term. *Willard v. Earley* (Pa.), 14 Atl. Rep. 426 (1888).

But a refusal to pay rent to a devisee under a contested will, accompanied with a declaration that he (the tenant) was ready to pay the rent to any per-

¹ *Adams on Ejectment*, 155.

Ad. & Ell. 427; *Doe v. Flynn*, 4 Tyr.

² *Adams on Ejectment*, 156; *Com.* 619.

Dig., tit. Forf., A 5; *Doe v. Wells*, 10

son who was entitled to receive it, was not a disavowal sufficient to dispense with the necessity of a regular notice. *Doe v. Pasquali*, Peake, 196; see *Doe v. Frowd*, 4 Bing. 557; *Adams on Ejectment*, 156.

Defendant, who held under a tenant for life, received, on the death of tenant for life, a letter from the lessor of the plaintiff, claiming as heir and demanding rent. Defendant answered that he held the premises as tenant to S.; that he had never considered lessor of plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that, without disputing the lessor of the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof in a legal manner: held, that this was a disclaimer of lessor of plaintiff's title. *Doe v. Frowd*, 4 Bing. 557.

When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as possession acquired originally by wrong. The act is conclusive on the tenant. He can not revoke his disclaimer and adverse claim so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right. *Willison v. Watkins*, 3 Pet. (U. S.) 49.

A entered on the land of B, with his permission, as a mere occupant, without any rent being reserved; B sold the land to C, under whom A continued in possession, and afterward sold all his right, etc., to D, who took possession, and claimed to hold under the deed from A; this disclaimer was held to be sufficient to dispense with a previous notice to quit. *Jackson v. Wheeler*, 6 Johns. (N. Y.) 272; *Tuttle v. Reynolds*, 1 Vt. 80; *Catlin v. Washburn*, 3 Vt. 26.

§ 36. Disavowal of the Landlord's Title.—Upon the disavowal of the landlord's title, the relation of landlord and tenant ceases, and as between them the tenant becomes a trespasser. The statute of limitations begins to run, and the landlord may sue at once to recover possession. He is not required to wait for the end of the leasehold term.¹

§ 37. Lodgings Taken for a Certain Period.—The law with respect to notices to quit, does not extend to cases of lodg-

¹ *Sternhauser v. Kuhn*, 50 Mich. Nev. & M. —; *Russell v. Fabyan*, 34 367; *McCartney v. Auer*, 50 Mo. 395; *N. H.* 118; *Kennedy v. Reynolds*, 27 *Doty v. Burdick*, 83 Ill. 473; *Douglass v. Anderson*, 32 Kan. 350; *Allen v. Paul*, 23 Gratt. (Va.) 333; *Waldo v. Bodley*, 14 Pet. (U. S.) 156; *Willison v. Walkins*, 3 Pet. (U. S.) 43; *Merryman v. Bourne*, 76 U. S. (9 Wall.) 592 (1869); *Jackson v. Wheeler*, 6 Johns. (N. Y.) 272; *Sharp v. Kelly*, 5 Denio, 431; *Meriman's Heirs v. Caldwell's Heirs*, 8 Ky. 34; *Doe v. Grubb*, 10 Barn. & C. 816; *Doe v. Pittman*, 2 v. Frowd, 4 Bing. 557.

ings; where lodgings are taken for a certain period, the tenancy terminates at the expiration of that period, without notice on either side; and a new contract, for a similar period, is implied by law, whenever the lodger continues in possession, and enters upon a fresh term, as for a week, if taken by the week, a month, if taken by the month, and the like.¹

A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent, but this is a very different thing from giving a week's notice to quit. The proposition contended for is this, that, if a tenant commences a new week, without giving notice, he is to be considered as contracting to hold, not only for that week, but also for the following week. In the absence of any evidence to prove a usage to that effect, in point of law, a week's notice to quit is not implied as a part of the contract, in the case of an ordinary weekly taking. *Huffell v. Armstrong*, 7 C. & P. 56.

The rule is thus laid down by Baron Parke: "I am not aware that it has ever been decided, that, in the case of an ordinary monthly or weekly tenancy, a month's or a week's notice to quit must be given." *Doe v. Hazell*, 1 Esp. 94.

§ 38. **Time of Notice May Be Fixed by Agreement, etc.**—The time of the notice is a matter now almost universally fixed by statute, but the parties may by special agreement in the lease vary the time of the notice; but the notice must, notwithstanding, where the letting is from year to year, expire with the year of the tenancy, unless the agreement also provides some other period for its expiration.² Where, however, the terms of the agreement are not intended to create a tenancy from year to year, determinable at a quarter's notice, but to empower the parties to put an end to the tenancy at other periods of the year, as well as at its termination, the courts will give effect to it.³

A demise for one year only, and then to continue tenant afterward, and quit at a quarter's notice; and a demise, where it was agreed "that the tenant was always to be subject to quit at three months' notice," have been

¹ *Wilson v. Martin*, 1 Denio (N. Y.), 434; *Hawford v. Ballard*, 39 N. Y. 602; *Adams on Ejectment*, 168; *Wilson v. Abbott*, 9 B. & C. 89; *Doe v. Banks v. Carter*, 7 Daly (N. Y.), 417; *Hazell*, 1 Esp. 94; *Roe v. Ruffin*, 6 Byrane v. Rogers, 8 Minn. 281; *Eichart v. Bargas*, 12 B. Mon. (Ky.) 464. In these cases, notices commensurate with the periods of letting had been given and the courts only decided that notices for longer periods were unnecessary.

² *Adams on Ejectment*, 170; *Doe v. Master*, 2 Barn. & C. 490; *Doe v. Donovan*, 1 Taunt. 155; *Kemp v. Derrett*, 3 Campb. 611; *Shirley v. Newman*, 1 Esp. 266.

³ *McCanna v. Johnson*, 19 Pa. St.

held to be demises determinable at the end, although not in the middle of any quarter. *Kemp v. Derrett*, 3 Camp. 611; *Shirley v. Newman*, 1 Esp. 266.

But a quarterly reservation of rent is not a circumstance from which an agreement to dispense with a half-yearly notice is to be inferred; although, where the landlord accepted in such case a three months' notice from his tenant, without expressing either his assent to, or dissent from such notice, it was held to be presumptive evidence of an agreement that three months' notice should be sufficient. *Adams on Ejectment*, 170.

Where in a case of a tenancy at will, no notice to quit having been given, the landlord and tenant agree that the latter shall leave the premises on a day named within the time in which the tenancy might be terminated by notice, it is a valid agreement changing the tenancy to one for a fixed term, and the giving up by each of his right to hold the other to the tenancy beyond the day named, is a sufficient consideration to sustain it. *Engels v. Mitchell*, 30 Minn. 122.

Where to a clause of re-entry in a lease, for non-payment of rent, there is attached a condition that the landlord shall, before entering, give to the tenant thirty days' notice, the landlord has no right to re-enter, unless he gives such notice. The right to re-enter for non-payment of rent is not incident to the estate of the lessor at common law, but must be reserved by deed, and all the conditions or stipulations annexed thereto must be strictly followed. *Smith v. Blaisdell*, 17 Vt. 199.

§ 39. Time of the Notice at Common Law.—At common law when a demand for possession or notice to quit was necessary to terminate a tenancy, it had to be given a due length of time before and terminate with a regular period in the tenancy, as for example at the end of the year, quarter, month or week, according to the landlord's right to terminate by notice. Hence, to terminate a tenancy by the month, a month's notice,¹ or by the week, a week's² notice was required and which had 'to be fixed by the rent day.' But these rules of the common law are abolished or modified in most of the American States.

In the absence of any provision of statute, or contract regarding it, a tenant from month to month is entitled to a month's notice to quit. *McDevitt v. Lambert*, 80 Ala. 536; 2 So. Rep. 438 (1887).

§ 40. Form of the Notice.—Under the common law where a landlord intended to enforce his claim to double value if the tenant held over, it was necessary that the notice to quit should be in writing; but for the purposes of an ejectment, a parol

¹ *Adams on Ejectment*, 169; *Pricket v. Ritter*, 16 Ill. 98; *Sam v. McLees*, (N. Y.) 619; *Prindle v. Anderson*, 19 24 Ill. 194.

² *Anderson v. Prindle*, 23 Wend. (N. Y.) 391; *Pricket v. Ritter*,

² *Doe v. Hazell*, 1 Esp. 94; *Roe v.* 16 Ill. 98.

Ruffin, 6 Esp. 4; *Doe v. Scott*, 6 Bing. 362.

notice was sufficient, unless the notice is required to be in writing, by express agreement between the parties, or by statutory requirement. It is, however, nevertheless, the general rule to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes and renders the evidence certain and correct. It is customary to address the notice to the tenant in possession; and it is perhaps most prudent to adhere to this form, though if proof can be given that the notice was served personally upon him, it is thereby rendered unnecessary.¹

The forms of the notices to quit and demands for possession are in general prescribed by statutes. The following are good in the absence of statutory form and are taken from Adams on Ejectment.

(1) *Notice to quit by the landlord to a tenant from year to year.*

SIR,

I hereby give you notice to quit and deliver up, on the——day of ——next, the possession of the messuage or dwelling-house (or “rooms and apartments,” or “farm lands and premises,”) with the appurtenances, which you now hold of me, situate in the parish of——in the county of ——

Dated the——day of ——18——

Yours, etc.,

A. B.

To Mr. C. D. (the tenant in possession) or (if it be doubtful who is tenant), To Mr. C. D. or whom else it may concern.

(2) *The like, by the landlord, where the commencement of the tenancy is doubtful.*

SIR,

I hereby give you notice, etc. (as in No. 1, to——“county of ——,”) provided your tenancy originally commenced at that time of the year; or, otherwise, that you quit and deliver up the possession of the said messuage (etc.) at the end of the year of your tenancy, which shall expire after the end of half a year from the time of your being served with this notice.

Dated (etc.)

Yours, etc.

A. B.

To Mr. C. D. (etc.)

(3) *The like, by an agent for the landlord.*

SIR,

I do hereby, as the agent for and on behalf of your landlord, A. B., of ——give you notice to quit and deliver up, on (etc.), (as in No. 1), which you now hold of the said A. B., situate (etc.)

Dated (etc.)

Yours, etc., E. F.,

Agent for the said A. B.

To Mr. C. D. (etc.)

Adams on Ejectment, appendix 461.

¹ Adams on Ejectment, 163; Tay- Blk. 533; Doe v. Crick, 5 Esp. 193; lor's Landlord and Tenant, 348; 4 Roe v. Pierce, 2 Camp. 96; Doe v. Geo. II, c. 28, s. 1; Legg v. Benion, Wrightman, 4 Esp. 5; Doe v. Spiller, Willes, 43; Timmins v. Rowlinson, 1 6 Esp. 70.

A notice to quit, purporting to be signed by the landlord by attorney, is good, where the attorney has authority to sign it, and no written authority is necessary, under Civil Code Cal. § 2309. *Felton v. Millard*, 81 Cal. 540; 21 Pac. Rep. 533 (1889).

Where a notice was addressed to the tenant by the wrong Christian name, and the tenant did not return it or object to it, and there was no tenant of the name mentioned in the notice, it was held to be sufficient. *Doe v. Spiller*, 6 Esp. 70; *Adams on Ejectment*, 163.

A subscribing witness to a notice to quit is unnecessary, and it is prudent not to have one, as it may occasion difficulties in the proof of the service, and can not be of the slightest advantage to the landlord. *Doe v. Durnford*, 2 M. & S. 62.

§ 41. Notice Must Not be Ambiguous.—Care should be taken that the words of the notice are clear and decisive, without ambiguity, or giving an alternative to the tenant, for, although courts will reluctantly listen to objections of this nature, yet, if the notice is really ambiguous, or optional, it will be sufficient to render it ineffectual, as far at least as the action of ejectment is concerned.¹

§ 42. The Notice Must Not Be in the Alternative.—A notice to quit will not be invalid for this cause unless it contain a real and *bona fide* option, not merely an apparent one; for, if it appear clearly, from the words of the notice, that the landlord had no other end in view than that of turning out the tenant, it will be deemed a notice sufficient to found an ejectment upon, notwithstanding an apparent alternative.²

The notice will be good if upon the whole it is sufficiently intelligible and certain that the tenant can not reasonably misunderstand it. An obvious mistake, in some part, will not invalidate it if it is otherwise so explicit that the party receiving it can not be misled. *Cook v. Creswell*, 44 Md. 581.

The words, "I desire you to quit the possession, at Lady-day next, of the premises, etc., in your possession, or I shall insist upon double rent," have been held to contain no alternative; because the landlord did not mean to offer a new bargain thereby, but only added the latter words as an emphatical way of enforcing the notice, and showing the tenant the legal consequences of his holding over. It was contended for the tenant, that this could

¹ *Taylor on Landlord and Tenant*, *Doe v. Archer*, 14 East, 245; 4 Barn. 349; *Adams on Ejectment*, 164; *Robt. & A.* 588; 8 Bing. 238; *Doe v. Wilberts v. Hayward*, 3 C. & P. 432; *kinson*, 12 Ad. & E. 743.

Elliott v. Stone, 12 Cush. (Mass.) 174; ²*Cook v. Creswell*, 44 Md. 581; *Currier v. Barker*, 2 Gray (Mass.), 224; *Adams on Ejectment*, 164; *Doe v. Granger v. Brown*, 11 Cush. (Mass.) *Jackson, Doug.* 175; *Doe v. Goldwin*, 191; *Doe v. Jackson, Doug.* 175; 2 Q. B. 142; *Doe v. Wrightman*, 4 *Williams v. Smith*, 5 Ad. & E. 350; *Esp.* 5; *Doe v. Archer*, 14 East, 245.

not be the construction of the notice, because the statute of 4 Geo. II, c. 28, does not give double the rent, but double the value, on holding over; but, Lord Mansfield, C. J., was of opinion that the notice, notwithstanding this variance, clearly referred to the statute. It seems, however, that if the words had been "or else that you agree to pay double rent," the notice would have been an alternative one. *Doe v. Jackson*, Doug. 175; *Adams on Ejectment*, 164; and see *Doe v. Goldwin*, 2 Q. B. 142; *Doe v. Wrightman*, 4 Esp. 5; *Doe v. Archer*, 14 East, 245.

A notice to quit at the end of the current year, "on failure whereof I shall require you to pay me double former rent, or value, for so long as you do detain possession," has been held to be an unqualified notice, and not giving an option to the tenant. *Doe v. Goldwin*, 2 Q. B. R. 142.

§ 43. The Intention Must Be Sufficiently Certain.—The courts will not invalidate a notice, on account of an ambiguity in the wording of it, provided the intention of the notice be sufficiently certain.¹

A misdescription of the premises, or a misstatement of dates which can not mislead, will not render the notice invalid. It need not be directed to the tenant, and if directed by a wrong name, if the tenant keeps it without objection the error is waived. *Doe v. Roe*, 4 Esp. 185.

An impossible year has been rejected. The notice was given, at Michaelmas, 1795, to quit at Lady-day, which will be in 1795, and was accompanied, at the time of the delivery to the tenant, with a declaration, that, as he would not agree to the terms proposed for a new lease, he must quit next Lady-day; and under these circumstances, the notice was considered to be sufficiently certain. The court was of opinion that the notice would have been good without the accompanying declaration, the words "which will be," manifestly referring to the then next Lady-day. *Doe v. Knightly*, 7 T. R. 63. Where there was a misdescription of the premises in the notice, which could lead to no mistake, the house being described therein as the Watermans' Arms, instead of the Bricklayers' Arms, no sign called the Watermans' Arms being in the parish, the notice was deemed a valid one. *Adams on Ejectment*, 165; *Doe d. Cox v. —*, 4 Esp. 185.

Where a farm was leased for twenty-one years, at a certain rent, consisting, as described in the lease, of the Town Barton, at one portion of the rent, and the Chippin Barton, at the residue, with a power reserved to determine the lease at the end of fourteen years, on giving a certain notice; it was held that a notice to quit "Town Barton, etc., agreeably to the terms of the covenant between us," etc., was held to be sufficient, because the landlord must have intended to give such a notice as the lease reserved to him the liberty of giving, and not a void notice to quit a part only, and so the notice must have been understood by the tenant. *Doe v. Archer*, 14 East, 245; *Adams on Ejectment*, 165.

A notice to a yearly tenant to quit the farm, etc., "situate at D., in the county of York, which you now hold under me," the premises not being situated at D. but at H., an adjoining parish, was held not to be a material

¹ *Boyton v. Bodwell*, 113 Mass. 531; *Currier v. Barker*, 2 Gray (Miss.), 224; *Adams on Ejectment*, 165.

variance, the tenant not having shown that he held more than one farm, or that he was misled by the notice. *Doe v. Wilkinson*, 12 Ad. & Ell. 743; *Adams on Ejectment*, 165.

§ 44. **The Notice Must Include All the Premises Sought to be Recovered.**—The notice must include all the premises held under the same demise, for, a landlord can not determine a tenancy as to part of the things demised, and continue it as to the residue.¹

Where the demise was of land and tithes, and the notice was to quit possession of "all that messuage, tenement or dwelling-house, farm-lands and premises, with the appurtenances, which you rent of me," it was held that the notice was sufficient to include the tithes; for the tithes being held along with the farm, the notice must have been understood by both parties to apply to both. *Doe v. Church*, 3 Campb. 71.

§ 45. **By Whom the Notice Should be Given.**—As a general rule of law, the notice to quit must be given the person entitled to the possession of the premises or his duly authorized agent.² This person is in general the landlord, but it may be his assignee, devisee, heir or executor. In cases where several persons seem to be interested in the estate sought to be recovered and there are doubts as to which is the real party entitled to the possession, it is best that all should join in the notice.³

§ 46. **The Notice Given by an Agent.**—The agent giving the notice to quit or making a demand for possession must be clothed with authority to give the notice or make the demand at the time when the notice is given or demand made. A subsequent assent or ratification of his acts on the part of the landlord are not sufficient to establish by relation a notice given or demand made in the first instance without his authority. *Adams* in his work on *Ejectment* says, "this principle is founded in reason and good sense, for as the tenant is to act upon the notice at the time it is given to him, it ought to be such a one as he may act upon with security. And if an authority by relation were sufficient, the situation of the tenant must remain doubtful until the ratification or disavowal

¹ *Adams on Ejectment*, 166; *Doe v. notice to quit the same as an adult. Archer*, 14 East, 245. 2 T. R. 159.

² *Adams on Ejectment*, 157; *Reeder v. Sayre*, 70 N. Y. 180; *Doe v. Baker*, 8 Taunt. 241; *Reeder v. Sayre*, 70 N. Y. 180. ³ *Doe v. Baker*, 8 Taunt. 241; *Reeder v. Sayre*, 70 N. Y. 180.

8 East, 165. An infant must give the

of the principal, and he would thereby sustain a manifest injustice.¹

The notice given by an agent should, of course, be given in the name and on behalf of his principal. Cole on Ejectment, 44.

An agent to receive rent has power to determine the agency by a notice to quit. Doe v. Mizern, 2 Moo. & R. 56, in Doe v. Walters, 10 B. & C. 633.

But a mere receiver of rents has no such authority. Doe v. Walters, 10 B. & C. 633.

A notice by an authorized agent is void; it can not be made valid by ratification after the proper time for giving the notice has elapsed. Doe v. Lester, 2 Q. B. 143.

A notice by an agent is not sufficient without evidence of his authority. Doe v. Robinson, 3 Bing. (N. C.) 677.

An agent authorized to commence the action, who is not an attorney, may employ an attorney to make the demand. Eldridge v. Holway, 18 Ill. 448.

A notice given by a person acting as steward of a corporation is sufficient without evidence that he had authority under seal from the corporation for such purposes. Doe v. Walters, 10 B. & C. 633.

The authority of the agent of a corporation to give notice to quit, to its tenants, need not be under seal. Wolf v. Goddard, 9 Watts (Penn.) 544.

A receiver in chancery, with power to let, is considered as the agent of the landlord sufficiently authorized to give a valid notice to quit. Wilkinson v. Colley, 5 Burr. 2694; Doe v. Read, 14 East, 57.

A notice to quit, purporting to be signed by the landlord by attorney, is good, where the attorney had authority to sign it, no written authority being necessary, under Civil Code Cal., § 2309. The tenant in such case questions the attorney's authority at his own risk. 21 Pac. Rep. 533, affirmed; Felton v. Millard, 81 Cal. 540; 22 Pac. Rep. 750 (1889).

§ 47. Notice by Joint Owners.—When two or more persons are interested in the premises, a notice to quit given by one, on behalf of himself and co-tenants, will be valid only as far as his own share is concerned, unless he was acting at the time under the authority of the other parties mentioned in the notice. But this rule does not hold when the parties are interested as joint tenants; because of the rule of law, that every act of one joint tenant, which is for the benefit of his co-joint tenant, shall bind him, and it must be predicated that the determination of the tenancy by such notice is for the benefit of the estate. And where several tenants in common are interested, as many of them as give notices may recover their respective shares, although the others do not join, unless, indeed, by the conditions of the tenancy, it is rendered necessary for all the

¹Doe v. Goldwin, 2 Q. B. 143; Adams on Ejectment, 158; Cole on Ejectment, 44.

parties to concur in the notice, in which case a notice given by some of the parties, without the junction or authority of their companions, will be altogether invalid.¹

Where A and B, two tenants in common, had agreed to divide their estate, and that Blackacre should belong to A; and the occupier of Blackacre afterward, and with knowledge of this agreement, paid his whole rent to A, and afterward received from him a notice to quit, such notice was held sufficient for both moieties, although the deed of partition was not signed, because the tenant, by payment of rent to B for the whole premises, had estopped himself from disputing his title to them. *Doe v. Mitchell*, 1 B. & B. 11; 3 B. Moore, 229.

A notice to quit, signed by three of four trustees, who were joint landlords of a house under a deed of trust is sufficient to terminate the relation of landlord and tenant between all the parties. *Alford v. Vickery*, Car. & M. 280.

But where a notice required the defendant to quit the entire estate, and it appeared that the plaintiff's title was an undivided interest, the defendant being in possession as a lessee of the other tenant in common, the defendant could not comply with the notice without giving up his legal right to the enjoyment of the undivided portion of the estate, which did not belong to the plaintiff. It was held that as he was not bound to do so, the notice was one which the plaintiff had no right to give, and the defendant was not bound to regard. It was not even effectual to terminate the right of the defendant to occupy the estate as the lessee of plaintiff. *King v. Dickerman*, 11 Gray (Mass.), 480 (1858).

§ 48. **Notice by an Agent for Joint Tenants, Tenants in Common, etc.**—Where two or more persons are interested as joint tenants, and the notice to quit is given by an agent, the authority of one of the joint tenants to such agent will bind his companions, and make the notice valid against all; but if the persons be interested as parceners or tenants in common, the notice will be available only for such portions of the land as the parties who have given authority to the agent before he delivered the notice shall be entitled to.²

A note from Adams on Ejectment.

The marginal note of the case of *Goodtitle d. King v. Woodward*, (3 B. & A. 689), is as follows: "To entitle joint tenants to recover in ejectment

¹ *Adams on Ejectment*, 158; *Kinginson*, 3 Bing. (N. C.) 677; *Doe v. Bullock*, 9 Dana (Ky.), 41; *Walters*, 10 B. & C. 626; *Doe v. M'Fadden v. Haley*, 2 Bay (S. C.), 457; *Chaplin*, 3 Taunt. 120; *Doe v. Baker*, *Perry v. Walker*, *Ib.* 461; *Perry v.* 8 Taunt. 241; *Alford v. Vickery*, 1 Middleton, *Ib.* 462; *Ib.* 539; *Watson* Car. & M. 280.

v. Hill, 1 M'Cord (S. C.), 161; *Taylor* ² *Adams on Ejectment*, 159; *Doe v. Perkins*, 1 A. K. Marsh. (Ky.) 253; *Somerset*, 1 Barn & A. 11; *Doe v. Right v. Cuthell*, 5 East, 491; *Doe v. Hughes*, 7 Mees. & W. 139. *Goldwin*, 2 Q. B. R. 142; *Doe v. Rob-*

against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is served; but if the notice be given by an agent, it is sufficient, if his authority be subsequently recognized; and, therefore, where such notice was given by an agent, under a written authority, which, at the time of the service of the notice, had been signed only by some of the several joint tenants, but afterwards was signed by all the others; Held, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was, therefore, sufficient." To the last edition of this treatise (Adams on Ejectment) the following note was appended, with respect to this case: "Notwithstanding the printed report of the case of *Goodtitle d. King v. Woodward*, (3 B. & A. 689,) I have not altered the principle laid down in the former editions of this work; by that, an agent must be clothed with authority to give a notice to quit at the time of giving the notice, in order to render it valid. The facts of that case were shortly as follows:—A, B, C and D were joint tenants; E gave the tenant in possession a written notice to quit, purporting to be given as the agent, and on the part of all the joint tenants; and, at the time of giving such notice, E had a written authority so to do from A and B, which authority was subsequently signed by C and D. According to a note taken by himself of the judgment of the court, the principle upon which the notice was held sufficient was, 'that a notice to quit, given by one joint tenant, was binding upon all, because otherwise the lessee would become a joint tenant with the party giving him notice, by which he would be subject to great inconvenience, and the estate of the co-joint tenants would be prejudiced; and, therefore, the notice must be taken to be an act beneficial to the estate, and consequently binding upon all the joint tenants;' and not as stated in the printed report, that 'a notice given by an agent is sufficient, if his authority be subsequently recognized.' The report is also, I believe, incorrect in stating, 'that, to entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is received;' the reverse of this proposition was, according to my note, maintained, viz., 'that a notice signed by one joint tenant was binding upon all,' and, indeed, such must have been the decision, if I have taken a correct view of the principle of the judgment. Without inquiring into the soundness of that principle, or whether it would not have been wiser to have placed joint tenants, parceners, and tenants in common, on the same footing with respect to notices to quit, there can be no doubt it is the only principle upon which that judgment can be supported with good faith to the tenant; because, if, after the delivery of the notice, an option remained to the parties who had not then signed the authority to confirm or disallow it, (as assumed in the printed report), the tenant had not 'such a notice as he could act upon with certainty at the time it was given,' to which all the authorities say he is entitled; but such certainty commenced only from the time of the recognition of the authority of the agent by these parties, which might have been only the day before the notice expired. And, as an option to recognize includes of necessity a right to disallow, how can a tenant possibly regulate his conduct as to the management of his farm, etc., if it may be doubtful, until the very day on which his notice expires, whether he will be permitted to go or compelled to stay?"

The more recent decisions have confirmed the correctness of this view of the case. *Adams on Ejectment*, 159.

§ 49. Service of the Demand or Notice.—As a general rule the demand or notice may be served by delivering a written or printed, or partly written and printed copy thereof to the tenant, or by leaving the same with some person above the age of twelve years residing on or in possession of the premises in question, and in case no one is in possession, then by posting the same on the premises. The service of this notice is in general a matter of statutory regulation.¹

In Illinois, any demand may be made or notice served by delivering a written or printed copy, or partly written and printed copy to the tenant himself, or by leaving it with some person, above the age of twelve years, residing on or in possession of the premises, and in case no one is in the actual possession, it may be served by posting it on the premises. *Laws of Ill.* 1865, 108, § 3.

Where, in an action by a landlord to recover possession after the expiration of the term, it appears that the tenancy was by a written lease for a period of one year, there is no error in admitting in evidence a written notice to quit, though the notice was not served in the manner required by statute. In such case no notice to quit is necessary, but, one having actually been given, it is competent evidence. *Snideman v. Snideman*, 118 Ind. 162; 20 N. E. Rep. 733 (109).

An allegation, in an action to eject a tenant holding over, of a written demand for possession prior to the action, and of the tenant's refusal to deliver possession, need not be proved when not denied in the answer. *Gassert v. Bogk*, 7 Mont. 535; 19 Pac. Rep. 281 (1833).

§ 50. Service of Notice, etc.—The Law Stated by Adams.—With respect to the mode of serving the notice, it is in all cases advisable, if possible, to deliver it to the tenant personally; but if personal service can not be effected, the service will be sufficient if the notice be left with the wife or servant of the tenant at his usual place of residence, whether upon the demised premises or elsewhere, and its nature and contents explained at the time, or in whatever other manner it may be served, if it can be shown that it came to the tenant's hands before the six months previous to the expiration of his year of holding. But a mere leaving of the notice at the tenant's

¹ The statutes of New York provide on the premises, it may be served by that it shall be served by delivering affixing it on a conspicuous part of it to the tenant or to some person of the premises where it may be conveniently read: 1 R. S. N. Y. 745, proper age residing on the premises, §§ 8, 9, or if the tenant can not be found and there be no such person residing

house, without proof that it was delivered to some member of the household, will not be a sufficient service.¹

In England the delivery of a notice on the premises to the wife or agent of the tenant, or any other person occupying the same jointly with or under him is a sufficient service. See *Walker v. Sharp*, 103 Mass. 154.

§ 51. Death of a Tenant from Year to Year.—When a tenant from year to year dies, his interest in the land vests in his personal representative who will continue to hold the premises upon the same terms as the original tenant, and be entitled to the same notice to quit. If, however, by the terms of the agreement, no interest vests in the representatives no notice to quit will be necessary.²

Where A agreed to demise a house to B, during the joint lives of A and B, and B entered in pursuance of the agreement, and before any lease was executed, died, after which B's executor took possession of the house; it was held that A might maintain ejectment against the executor without notice to quit, because the death of B determined his interest, and consequently no interest vested in the executor. The court were also of opinion that the case would have been the same if the lease had been executed. *Doe v. Smith*, 6 East, 530; *Adams on Ejectment*, 157.

Where a tenant dies, the notice may be served on the administrator, who pays the rent. *Prior v. Ongley*, 10 C. B. 25.

§ 52. Death of the Landlord.—The situation of a tenant from year to year remains unaltered, notwithstanding the death of the landlord, and he will be entitled to his regular notice to quit, whether the lands descended to the heir, although such heir be a minor, or pass to the personal representative or devisee of the deceased.³

§ 53. Upon Whom the Notice Should be Served.—Where the relation of landlord and tenant exists, difficulties can seldom occur as to the party upon whom the notice should be served. The service should invariably be upon the tenant of the party serving the notice, notwithstanding a part, or even the whole of the premises, may have been underlet by him. And in a case where the service was upon a relation of the under-tenant upon the premises, Lord Ellenborough held the service to be insufficient, although the notice was addressed to

¹ *Adams on Ejectment*, 162; *Jones v. Marsh*, 4 T. R. 464; *Doe v. Watkins*,

7 East, 553; *Doe v. Dunbar*, 1 M. & W. 10; *Smith v. Clarke*, 9 Dow. P. C. 202; *Alford v. Vickery*, 1 Car. & M. 280; *Doe v. Lucas*, 5 Esp. 153.

² *Adams on Ejectment*, 157.

³ *Maddon v. White*, 2 T. R. 159; *Adams on Ejectment*, 157.

the original tenant. The original tenant is liable to an ejectment, at the expiration of the notice, for the lands in the possession of his under-tenants, although he may, on his part, have given proper notices to them, and delivered up such parts of the premises as were under his own control.¹

A notice to the occupying party, signed by the authorized agent or attorney of the lawful claimant, and duly served, is a sufficient notice to recover possession of premises unlawfully occupied. *Post v. Bohner*, 23 Neb. 257; 36 N. W. Rep. 508 (1888).

Notice to quit, given by the lessor to his immediate lessee, who has continued to pay him his annual rent, is sufficient, though another person is in possession of the premises. *Jackson v. Baker*, 10 Johns. (N. Y.) 270.

When a tenant from year to year died, and a notice was served upon the widow, who remained in possession, and no proof was given that there was any personal representative of the testator, the notice was held sufficient. *Doe v. Perrott*, 4 C. & P. 230.

§ 54. Where the Premises are in the Possession of Two or More Joint Tenants or Tenants in Common.—Where the premises are in the possession of two or more, as joint tenants, or tenants in common, a written notice to quit, addressed to all, and served upon one only, will be a good notice; so also a parol notice, given to one co-tenant only, will bind his fellow.²

Where the defendant and his wife are absent from the State, service on the tenant's partner, at his place of business, is valid. *Walker v. Sharpe*, 103 Mass. 154.

§ 55. Service upon Corporations.—When a corporation is the tenant, the notice should be addressed to the corporation, and served upon its officers; notice addressed to the officers will not be sufficient.³

§ 56. When the Notice is to be Served.—A tenant sometimes enters upon different parts of the land at different periods of the year, although all are contained in one demise, and the notice to quit must then be given with reference to the substantial time of entry, that is to say, with reference to the time of entry on the substantial part of the premises demised, no notice being taken of the time of entry on the other parts, which are auxiliaries only, though the tenant will be obliged

¹ *Adams on Ejectment*, 161; *Doe v. v. Watkins*, 7 East, 551; *Doe v. Levi*, M. T. 1811, MS.; *Roe v. Wiggs*, Crick, 5 Esp. 196.

2 N. R. 330; *Pleasant v. Benson*, 14 East, 234.

³ *Adams on Ejectment*, 162; *Doe v. Woodman*, 8 East, 228.

² *Adams on Ejectment*, 161; *Doe*

to quit them at the respective times of entry thereon.¹ This substantial time of entry, it has been contended, must be determined by the times when the rent is payable, but it is holden to depend, either upon the general custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises, and of these facts it is the province of the jury to determine.²

In South Carolina, the rule that a tenancy from year to year of a farm used for agricultural purposes looks to the end of the calendar year for its termination, applies equally to a tenancy from year to year of premises, consisting of a city house and lot. *Wilson v. Rodeman*, 80 S. C. 210; 8 S. E. Rep. 855 (1889).

Where the premises contained in the demise consisted of dwelling houses and other buildings, used for the purpose of carrying on a manufacture, a few acres of meadow and pasture land and bleaching grounds, together with all watercourses, etc., and the tenant held under a written agreement for a lease, to commence as to the meadow ground, from the 25th of December then last, as to the pasture, from the 25th of March then next, and as to the houses, mills and all the rest of the premises, from the 1st of May, the rent payable on the day of Pentecost and Martinmas, the court held, that the substantial time of entry was the 1st of May, inasmuch as the substantial subject of the demise was the house and buildings for the purpose of the manufacture, to which everything else in the demise was merely auxiliary. *Doe v. Watkins*, 7 East, 551; *Adams on Ejectment*, 175.

When a house and thirteen acres of land were demised for eleven years, to hold the lands from the 2d of February, and the house and other premises from the first of May, at the yearly rent of £24, payable at Michaelmas and Lady-day, the jury found the land to be the principal subject of the demise, and the plaintiff was non-suited on account of the notice to quit not having been given six months previous to the 2d of February. *Doe v. Harwood*, 11 East, 498.

§ 57. **Waiver of the Notice after Given.**—The acceptance of rent, accruing subsequently to the expiration of the notice, is the most usual means by which a waiver of it is occasioned; but the acceptance of such rent is not of itself a waiver of the notice, but matter of evidence only to be left to the jury to determine with what views and under what circumstances the rent is paid and received.³

Where ejectment is brought by a landlord against a tenant, relying upon a disclaimer, any subsequent act acknowledging the party as his tenant, such as distraining for rent, is a waiver of the disclaimer. *Doe v. Williams*, 7 Car. & P. 322.

¹ *Doe v. Spence*, 6 East, 120.

² *Adams on Ejectment*, 174.

³ *Prindle v. Anderson*, 19 Wend. (N. Y.) 391; 23 Wend. (N. Y.) 616;

Collins v. County, 6 Cush. (Mass.)

415; *Adams on Ejectment*, 176; *Good-*

right v. Cordwent, 6 T. R. 219.

§ 58. **Waiver a Matter of Intention.**—If the money be taken *nomine pænæ*, as a compensation for the trespass, or with an express declaration that the notice is not thereby intended to be waived, or if there be any fraud or contrivance on the part of the tenant in paying it, or if the payment be accompanied by other circumstances which may induce an opinion that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance. The rent must be paid and received as rent; that is, it must be so paid and received as to satisfy the jury of an intention to continue the tenancy, or the notice will remain in force.¹

A mutual understanding that it is waived, constitutes a waiver; and long delay to give notice to quit, and a subsequent acceptance of rent, are competent evidence as tending to show such an understanding. And so if the parties treated the tenancy as existing, after the demand, in all respects as before, the same will tend to show the understanding of the parties that such a demand is waived. *Norris v. Morrill*, 40 N. H. 395.

Where the landlord brought an ejectment immediately upon the expiration of the notice, and after the appearance of the tenant in the action, received from him a quarter's rent, accruing subsequently to the day when the notice expired, but nevertheless continued his action, the court were of opinion, upon a motion for a new trial after a verdict for the defendant, that from the continuance of the suit by the landlord, after the acceptance of the rent, a fair inference might be drawn that he did not mean to waive his notice; and as that point had not been left for the consideration of the jury (who had been directed at the trial to find for the defendant, upon the simple fact of the quarter's rent having been paid and received), the motion for the new trial was granted. *Doe v. Batten*, *Cowp.* 243; *Adams on Ejectment*, 177.

Where the rent was usually paid at a banker's, and the banker, in the common routine of business, received a quarter's rent from the tenant after the expiration of the notice, no waiver of the notice was thereby created. *Doe v. Calvert*, 2 *Campb.* 387; *Adams on Ejectment*, 175.

Where the notice expired at Michaelmas, 1792, and the landlord accepted rent due at Lady-day, 1793, and did not bring his ejectment until after such acceptance, nor try the cause until 1795, the jury held that the notice was waived. *Goodright v. Cordwent*, 6 T. R. 219; *Adams on Ejectment*, 175.

Where A, who had a lease until a day certain, having had notice to quit, held over, and ejectment was brought against him by the lessor, and pending this action he gave up the possession, and then the lessor sued him and recovered a certain sum for his use and occupation of the premises during the time he held over: *Held*, that this was not a waiver of the notice. *Stedman v. McIntyre*, 5 *Ired. (N. C.)* 571.

A parol disclaimer of the landlord's title by the tenant, does not work a forfeiture of a written lease for a term of years. *De Lancey v. Ganun*, 12 *Barb. (N. Y.)* 120.

¹ *Adams on Ejectment*, 176.

After verdict against a tenant for not quitting pursuant to notice, a subsequent distress by the landlord for rent due after the verdict, does not waive the notice to quit; nor is it any ground for setting aside the verdict, or staying execution. *Doe v. Darby, Clerk*, 8 Taunt. 538.

By the common law, if a landlord distrained after the expiration of a term, though for rent accruing during its continuance, he was held to have acknowledged a subsequent tenancy; because, by the common law, no distress could be made after the determination of a demise. *Adams on Ejectment*, 181.

§ 59. By Acts of the Landlord—All Acts of Waiver Open to Explanation.—The notice may also be waived by other acts of the landlord; but they are all open to explanation, and the particular act will, or will not, be a waiver of the notice, according to the circumstances which attend it. Thus, a second notice to quit, given after the expiration of the first notice, but also after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding his second notice, was holden to be no waiver of the notice originally given; because it was impossible for the tenant to suppose that the landlord meant to waive a notice upon the foundation of which he was proceeding to turn him out of his farm.¹

After the expiration of a regular notice to quit, the landlord gave a second notice in these words: "I do hereby desire you to quit the premises which you now hold of me, within fourteen days from this date, or I shall insist upon double value." It was held by Lord Ellenborough, that the second notice could not be intended, or understood to be intended, as a waiver of the first, or even as an acknowledgment of a subsisting tenancy at will, having for its object merely the recovery of double value; and the lessor of the plaintiff recovered upon a demise anterior to the expiration of the second notice. *Doe v. Steel*, 3 Campb. 115; *Adams on Ejectment*, 178.

Where a notice was given "to quit the premises which you hold under me, your term therein having long since expired," the court considered the paper as a mere demand of possession, and not as a recognition of a subsisting tenancy. *Doe v. Inglis*, 3 Taunt. 54; *Adams on Ejectment*, 178.

Where a landlord, after the delivery of a notice to quit, promised the tenant that he should not be turned out until the place was sold, and after the sale of the premises brought an ejectment upon a demise anterior to the time of the sale, it was contended that the permission to occupy was a waiver of the antecedent notice, so far as to prevent the tenant from being considered as a trespasser by relation back to the time when the notice expired, and that the demise ought to have been laid posterior to the day when the contract for the sale was made. But the court held, that the permission amounted only to a declaration on the part of the landlord, that until the sale of the place, he would suspend the exercise of his right under

¹ *Adams on Ejectment*, 177.

the notice, and indulge the tenant by permitting him to remain on the premises, and that it was not intended to vacate the notice, or be destructive of any of the rights which the landlord had acquired under it. *Whiteacre v. Symonds*, 10 East, 13; *Adams on Ejectment*, 179.

§ 60. **The Subject Continued.**—In cases where the act of the landlord can not be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover it in an action for use and occupation, the notice will of course be waived; but it seems that a pending action for such use and occupation will not be sufficient to invalidate the notice; for the landlord may only recover to the time of the expiration of the notice, although he claim rent to a later period.¹

Where a landlord, after a verdict in ejectment founded on a notice to quit, distrained for rent due subsequently to the expiration of the notice, and the party submitted and paid the rent, it was held to be no ground for staying the subsequent proceedings in the ejectment; for the distress was wrongful, and might have been disputed by the tenant. *Doe v. Darby*, 8 Taunt. 538; *Adams on Ejectment*, 181.

§ 61. **Waiver of Defects in the Notice.**—Where a tenancy from year to year subsists between the parties, an ejectment can not be maintained on a parol notice to quit at a shorter period than half a year, or expiring at a wrong period of the tenancy, notwithstanding the assent of the tenant to such notice, unless such assent be in writing; because, the notice being insufficient in itself to determine the tenant's interest, his assent can only make it operative as a surrender of the term; and as such surrender is not by operation of law, but an actual surrender by agreement between the parties, it is void by the statute of frauds, which requires that such surrender should be by note in writing.²

§ 62. **The Tenant is Estopped to Deny his Landlord's Title.**—It is a universal rule of law governing the relation of landlord and tenant in controversies between themselves concerning the possession of the demised premises that the tenant is estopped from assailing the landlord's title either directly³

¹*Adams on Ejectment*, 180; *Zouch v. Willingale*, 1 H. Bl. 311; *Birch v. Wright*, 1 T. R. 378; *Roe v. Minshall*, S. N. P. 650.

²*Adams on Ejectment*, 181; *Doe v. Johnson*, 1 M'Leland and Yonge, 141; *Johnson v. Huddleston*, 4 B. & C. 922.

³*Scott v. Rutherford*, 92 U. S. 107; *O'Hallaran v. Fitzgerald*, 71 Ill. 53; *Terrett v. Cowenhoren*, 79 N. Y. 400; *Silvey v. Summer*, 61 Mo. 253; *Hawes v. Shaw*, 100 Mass. 187; *James v. Jenkins*, 33 Ark. 536; *Donald v. McKinnon*, 17 Fla. 746; *Cook v. Cresswell*, 44 Md. 581; *Morrison v. Bassett*,

by denying the same or indirectly by setting up an outstanding title hostile to that of the landlord.⁴ A tenant is not precluded from denying the title of his landlord and setting up the title in himself adversely to his landlord when the controversy is between him and a stranger. The reason of this rule is that the elements of the estoppel are wanting, when a person not in privity with the landlord seeks to avail himself of it. Estoppels must be mutual and operative between these parties and their privies.³

Where an acknowledgment of tenancy on the part of the defendant in ejectment has been proved, he will not be allowed to give evidence to contradict or disprove the title of his landlord. *Jackson v. Vosburgh*, 7 Johns. (N. Y.) 186; *Jackson v. Davis*, 5 Cow. (N. Y.) 129; *Lessee of Galloway v. Ogle*, 2 Binn. (Penn.) 472; *Graham v. Moore*, 4 Serg. & R. (Penn.) 467; *Brandter v. Marshall*, 1 Caines' Rep. (N. Y.) 401; *Jackson v. Harsen*, 7 Cow. (N. Y.) 323; *Jackson v. Reynolds*, 1 Caines' Rep. (N. Y.) 444; *Jackson v. Whitford*, 2 Caines' Rep. (N. Y.) 215; *Jackson v. Graham*, 3 Caines' Rep. (N. Y.) 188; *Barr v. Gratz's heirs*, 4 Wheat. (U. S.) 222; *Tuttle v. Reynolds*, 1 Vt. 80.

It is an undoubted principle of law, fully recognized in this court, that a tenant can not dispute the title of his landlord, either by setting up a title in himself or a third person during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating that contract by which he claimed and held the possession. He can not change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title and ready to be surrendered by its termination, by the lapse of time, or demand of possession. *Willison v. Watkins*, 3 Pet. (U. S.) 47.

The same principle applies to a mortgagor or a mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. *Willison v. Watkins*, 3 Pet. (U. S.) 48.

§ 63. **Limit of the Estoppel.**—The estoppel of the tenant to deny the title of his landlord applies in strictness to the title of his landlord under which he entered. It does not prevent the tenant from purchasing a title from a third person

26 Minn. 235; *Love v. Law*, 57 Miss. O'Hallaran v. Fitzgerald, 71 Ill. 53; 596; *Davis v. Davis*, 83 N. C. 71; *Pope v. Harkins*, 16 Ala. 321; *Galloway v. Jones v. Dore*, 7 Oreg. 467; *Syler v. Ogle*, 2 Binn. (Penn.) 463; *Murphy*, 38 Tex. 75; *Hotch v. Bullock*, *Jackson v. Harper*, 5 Wend. (N. Y.) 57 N. H. 15; *Bradish v. Dubuque*, 38 246.

Iowa, 341; *Longfellow v. Longfellow*, ² *Cole v. Maxfield*, 13 Minn. 235; 61 Me. 590. see chapter, "Estoppel to Deny Title."

¹ *Bertram v. Cook*, 32 Mich. 548;

and asserting it against the title of his landlord after he has first terminated his holding under the landlord by delivering the possession back to him.¹ The estoppel does not apply to cases in which the tenant has been induced to enter into a lease by force, fraud or misrepresentation.² Where an attornment of the tenant has been induced by the misrepresentations of his landlord,³ or where the landlord has received rent by mistake or a false claim of title⁴ a tenant whose entry is made under one person, and who subsequently acknowledges the title of another person, is not, as a general rule, estopped from subsequently denying the holding the latter.⁵ But the authorities upon this rule do not seem to be quite uniform.⁶

A tenant may show that his landlord's title was an estate less than the fee, and that it has been extinguished during his term. *Lamson v. Clarkson*, 113 Mass. 348.

Where a landlord shows no title, but asks to be restored to the possession with which he parted, good faith requires it should be re-delivered to him, it being no answer to say he is not the owner of the land. But where he claims on the separate grounds of original title, and as having parted with the possession pursuant to a lease, the defendant will be permitted to meet him separately on each. *Miller v. McBrier*, 14 Serg. & R. (Penn.) 384; *Camp v. Camp*, 5 Conn. 300.

A tenant may acquire the title by purchase at an execution sale and assert it against his landlord. *Tex. Land Co. v. Tieman*, 53 Tex. 619; *Casey v. Gregory*, 13 B. Mon. (Ky.) 505.

A tenant, who is under no obligation to pay taxes, may purchase the land at the tax sale, and under the title so required he may resist a recovery by his landlord. *Weichselbaum v. Clarkson*, 20 Kan. 709.

When the landlord has in fact no title the doctrine of estoppel can not apply, as for example where the landlord's title has expired or been extinguished. *Tilghman v. Little*, 13 Ill. 239; *Kinney v. Doe*, 8 Blackf. (Ind.) 350; *Pentz v. Kuester*, 41 Mo. 447; *Russell v. Allard*, 18 N. H. 223; *Horner v. Leeds*, 25 N. J. L. 106; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Randolph v. Carlton*, 8 Ala. 606; *Wheelock v. Warschauer*, 21 Calif. 309; *Greg-*

¹ *Nims v. Sherman*, 43 Mich. 45; ⁵ *Alderson v. Miller*, 15 Gratt. (Va.) 279; *Washington v. Conrad*, 2 Williams v. Garrison, 29 Ga. 503; see *Humph. (Tenn.) 562*; *Jackson v. Leek*, Attornment.

² *Higgins v. Turner*, 61 Mo. 249; 12 Wend. (N. Y.) 105; *Franklin v. Turpin v. Saunders*, 32 Gratt. (Va.) Merida, 35 Calif. 558.

27; *Johnson v. Cheley*, 43 Calif. 300; ⁶ *Prevot v. Lawrence*, 51 N. Y. 219; *Miller v. Bonsadon*, 9 Ala. 317. *Hall v. Butler*, 10 Ad. & E. 204; *Mar-*

³ *Schultz v. Arnot*, 33 Mo. 172; *low v. Wiggins*, 4 Ad. & E. (N. S.) *Miller v. McBrier*, 14 Serg. & R. 367; *Saunders v. Moore*, 14 Bush. (Penn.) 382; *Anderson v. Smith*, 63 (Ky.) 98. Ill. 126.

⁴ *Miller v. McBrier*, 14 Serg. & R. (Penn.) 382.

ory v. Crab, 2 B. Mon. (Ky.) 234; Giles v. Ebsworth, 10 Md. 333; Wolf v. Johnson, 30 Miss. 513; Camp v. Camp, 5 Conn. 291.

The rule of law, that the tenant can not contest his landlord's title, is not applicable where the title of such landlord is a Connecticut title, existing in violation of the laws of Pennsylvania. Therefore, such tenant afterward purchasing a Pennsylvania title, and continuing to hold under it, may set up against the original landlord, who claimed under a Connecticut title, though, subsequently to such purchase, the landlord also took out another Pennsylvania title. *Satterlee v. Matthewson*, 13 Serg. & R. (Penn.) 133.

§ 64. **An Attornment as a Denial of the Landlord's Title.**—A tenant who has been evicted by a judgment under a paramount title, may transfer his homage to the successful party, and deny the title of him under whom he entered by setting up the paramount title.¹

A tenant can not make a valid attornment to a stranger, even at the end of his term, without a surrender of possession to his landlord, unless such stranger acquired title from the same source with that of the landlord, and a mere tax collector's deed does not show such source; and the fact of the death of the landlord, and that his heirs were unknown to the tenant, does not change the rule. *Fowler v. Simpson*, 79 Tex. 611; 15 S. W. Rep. 682 (1891).

The fact that a tenant attorns and pays rent to another is not sufficient to make his holding adverse to his landlord, unless the latter has notice of his attornment.

The fact that a relative of a landlord, who lived near the land, wrote a letter to such landlord notifying him of his tenant's attornment to a third person, and placed it in the post-office addressed to the landlord at the place where he was accustomed to receive letters, is *prima facie* proof of notice to the landlord of the attornment. *DeJarnette v. McDaniel* (Ala.), 9 So. Rep. 570 (1891).

One in possession of land as tenant of one of the joint owners conveyed his tenancy to another, and he to another, who attorned to the defendants. The plaintiff acquired the title under which the first tenant entered. Held, that the attornment to defendants did not subordinate their title to that of plaintiff. *Maverick v. Flores*, 71 Tex. 110; 8 S. W. Rep. 636 (1888).

¹ *Supervisors v. Herrington*, 50 Ill. Marsh. (Ky.) 104; see *Attornment*, 232; *Moffatt v. Strong*, 9 Bosw. (N. Y.) 57; *Sunsford v. Turner*, 5 J. J.

CHAPTER IX.

DUTY OF A TENANT WHEN SUED IN EJECTMENT.

- § 1. Subject of the Chapter.
- 2. Duty of Tenant When Sued in Ejectment.
- 3. History of the Law.
- 4. A Remedy.
- 5. Meaning of the Word "Landlord."
- 6. Lord Mansfield's Construction.
- 7. The Term Extends to All Persons Claiming Title, etc.
- 8. The Rule in the American States.
- 9. The Tenant's Duty to Notify His Landlord.
- 10. The Tenant's Right to Attorn after Notifying Landlord.
- 11. An Attornment—The Term Defined.
- 12. The Practice—Motion of Landlord, etc.
- 13. A Question of Practice.
- 14. Courts Exercise Equitable Jurisdiction.
- 15. The Remedy Where the Rule Is Improperly Granted.
- 16. Statutory Provisions.

§ 1. **Subject of the Chapter.**—It is proposed in this chapter to consider the proceedings on the part of the tenant in possession when sued in ejectment by any person other than his landlord, and point out the persons who may appear and defend the action, in what manner such appearance is to be made, and the active steps necessary to be taken to bring the matter in controversy to trial.

§ 2. **Duty of Tenant When Sued in Ejectment.**—While the rules of modern practice require that an action should be brought against the real parties in interest, it is as a general rule in actions for the recovery of the possession of real property sufficient to bring the action against the person in possession. And in all cases where such person is holding such possession under a third person, it is the duty of the occupant, enjoined upon him by law, to give immediate notice of the service of process upon him in such action to the person under whom he holds, and it is the right and privilege of such person to appear and defend the action.¹

¹ Statute 11, Geo. II, Ch. 19, § 13; § 21; R. S. III., 1845, 324, § 5; Jack-Fairclaim v. Shamlittle, Burr, 1301; son v. Stiles, 1 Cow. (N. Y.) 134. R. S. N. Y., Part 2, Ch. 1, Tit. 4,

§ 3. **History of the Law.**—In England, notwithstanding the power possessed by the courts of framing rules for the improvement of this remedy, the interference of the Legislature has at times been called for, and it has been most beneficially exerted in regulating the appearances to the action. The tenant in possession, being the person *prima facie* interested, is, of course, the party on whom the process is always served; although it frequently happens in practice, that the lands belong to some third person out of possession, to whom such service can afford no information of the proceedings against him, and who, by the common law, has no remedy against his tenant if he omit to give him notice of them. By the rules and practice of the English courts also, for it would scarcely be correct to say by the common law, the landlord, it seems, was not permitted to defend, even when he did receive notice, unless the tenant consented to become a co-defendant with him;¹ and no means existed by which the tenant could be compelled to appear and be made such co-defendant.² This system occasioned great inconvenience to landlords. The tenants, from negligence or fraud, frequently omitted to appear themselves, or to give the landlords the necessary notice; and although judgments against the casual ejectors have been set aside, upon affidavits of circumstances of this nature, the remedy was still very incomplete.³

§ 4. **A Remedy.**—To remedy these imperfections, the English courts were authorized, by 11 Geo. II, c. 19, s. 13, to suffer the landlord to make himself defendant by joining with the tenants, in case they appeared; but in case they refused or neglected to appear, and the landlord desired to appear by himself, the court should permit such landlord so to do, judgment being first signed against the casual ejector, and order a stay of execution upon such judgment until further order, etc.⁴ By the 12th section of the same statute it was also enacted, "That every tenant, to whom any declaration in ejectment shall be delivered, shall forthwith give notice thereof, to his landlord, bailiff, or receiver, under the penalty of forfeiting the value of three years' improved, or rack rent of the demised premises, to be recovered by action of debt."⁵

¹ Lill. Pr. Reg., 674.

⁴ Adams on Ejectment, 284.

² Goodright v. Hart, Stran. 880.

⁵ This latter action has been inter-

³ Anon., 12 Mod. 211; Adams on Ejectment, 284. pretended to extend only to those cases in which the ejectments are inconsis-

Where the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default; and the declaration did not mention mines at all, but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised by the tenant, and also of those mines in which he had only liberty to dig; held, that, though the latter could not be recovered under the declaration in ejectment, still, that the tenant, by his own act, had estopped himself from taking that objection, and, that, in an action for the value of three years' improved rent, under the statute of 11 G. II, c. 19, the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only liberty to dig.

The improved or rack-rent mentioned in the 11 G. II, ch. 19, sec. 12, is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on, at the time of delivering the declaration in ejectment, in case the premises were then to be let. *Crocker v. Fothergill*, 2 Barn. & A. 652.

The first enactment in the thirteenth section of the statute, providing that landlords may be made defendants by joining with the defendants in possession, is only a legislative sanction of the previous uniform practice of the English courts. It is said, by Wilmot, J.,¹ that landlords were permitted, before the statute, to defend ejectments without joining the tenants in possession. There seems to be but one case extant, in which the contrary doctrine is maintained;² and the loose notes to be found of cases previous to that decision certainly favor Mr. Wilmot's opinion.³ It is probable that the practice was not clearly settled until the time of such decision, and that the statute was enacted in consequence of the inconvenience resulting from it.⁴

§ 5. Meaning of the Word "Landlord" in the English Law.—By the words of the statute the courts could admit landlords only to defend, and difficulties frequently arose as to the meaning of the word landlord, and as to what interest in the disputed premises would be sufficient to entitle a person claiming title, to appear and defend the action.⁵

tent with the landlord's title. Thus, ⁴ *Fairclaim v. Shamtitle*, Burr. 1290, 1298; see *Adams on Ejectment*, 284; *Runnington on Ejectment*, 167, brought by the mortgagee upon the forfeiture of the mortgage, is not 168, 466.
within the penalties of the clause. *Buckley v. Buckley*, 1 T. R. 647.

¹ *Fairclaim v. Shamtitle*, Burr. 1301.

² *Goodright v. Hart*, Stran. 830.

³ *Lamb v. Archer*, Comb. 208; ⁴ *Wash. C. C. (U. S.)* 286.
Anon., 12 Mod. 211.

⁵ The defendant's name will not be struck out, in order to substitute the landlord's, without the plaintiff's consent, but the landlord may be made a co-defendant. *Emlen v. Hoops*, 3 Serg. & R. 130; *Beardsley v. Torrey*,

In the first reported case upon the construction of this section, it was holden, that it was not every person claiming title who could be admitted to defend as landlord, but only he who had been in some degree in possession, as receiving rent, etc., and upon this principle the court would not allow a devisee claiming under one will to defend as landlord in an ejectment, brought by a devisee claiming under another will of the same testator. But this doctrine was afterward reprobated by Lord Mansfield, in a case where the principles of the law were fully considered, and the previous decisions investigated and explained.

A motion to admit a landlord to defend in ejectment, may be grounded on the affidavit of his agent showing the relation of landlord and tenant between him and the tenant in possession. *Jackson v. Stiles*, 1 Cow. (N. Y.) 134; *Den v. Fen*, 1 Halst. (N. J.) 185.

Where the lessor of the plaintiff proceeded as for a vacant possession, and obtained a regular judgment by default, it was set aside and the person claiming to be owner of the land, on the affidavit of merits, etc., was admitted as defendant, on payment of costs, and stipulating to admit he was in possession at the commencement of the suit. *Wood v. Wood*, 9 Johns. (N. Y.) 257.

It is error to allow the landlord of the defendants in ejectment to substitute his own name as defendant, in place of the person sued, without the consent of the plaintiff. *Merritt v. Thompson*, 13 Ill. 716.

A person claiming to be let in to defend in ejectment must show that his title is connected to and consistent with the possession of the occupant. *Troublesome ex dem. Dougherty v. Estill*, 1 Bibb. (Ky.) 128; *Den v. Shape*, 1 Green (Iowa) 66; *Jackson v. McEvoy*, 1 Cai. 151; *Doe v. Johnson*, 2 Scam. (Ill.) 522.

In ejectment, a landlord proving that the tenant entered on the land under him, will be permitted to defend the action, although it appears that the tenant has been found guilty of a forcible detainer against the landlord. *McClelland v. Sprigg*, 3 Bibb. (Ky.) 266.

Landlord admitted to defend can make no defense which the tenant could not make. *Crocket v. Lashbrook*, 5 Mon. (Ky.) 539.

A mortgagee in possession may be let in to defend in ejectment. *Jackson v. Stiles*, 11 Johns. (N. Y.) 407; *Jackson v. Babcock*, 11 Johns. (N. Y.) 112; *Den v. Fen*, 1 Halst. (N. J.) 478. So, also, the assignee of a mortgage. *Jackson v. Babcock*, 11 Johns. (N. Y.) 112.

When a third person applies to be made a defendant, he must show that he is the landlord or other proper person; *Dent v. Lanning*, 6 Halst. (N. J.) 185; *Buford v. Gaines*, 6 Marsh. (U. S.) 34.

The heirs have a right to defend an ejectment brought against a widow remaining in the house, until her dower is allotted. *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253.

The tenants in possession are the proper, if not the natural defendants to an ejectment; although the landlord has a right to be made a defendant, to prevent his being injured by a combination between the lessor of the plaintiff

iff and his tenant; but, he may waive his right, or, having asserted it, may relinquish it by consent of the lessor of the plaintiff. *Herbert v. Alexander*, 2 Call. (Va.) 498.

§ 6. **Lord Mansfield's Construction.**—"There are two matters to be considered. First, whether the term 'landlord,' ought not, as to this purpose, to extend to every person whose title is connected to, and consistent with, the possession of the occupier, and divested, or disturbed, by any claim adverse to such possession, as in the case of remainders, or reversions, expectant upon particular estates; secondly, whether it does not extend, as between two persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*, so as to prevent either from recovering by collusion with the occupier, without a fair trial with the other. Where a person claims in opposition to the title of the tenant in possession, he can in no light be considered as landlord; and it would be unjust to the tenant, to make him a co-defendant; their defences might clash. Whereas, where there is a privity between them, their defence must be upon the same bottom; and letting the person in behind, can only operate to prevent treachery and collusion." It is no answer, "that any person affected by the judgment may bring a new ejectment;" because there is a great difference between being plaintiff or defendant in ejectment.¹

The principles laid down by Lord Kenyon, in the case of *Lovelock v. Dancaster*, (3 T. R. 783,) seems to support the doctrine of Lord Mansfield, above mentioned; although, from the omission, in the report of the case, of the facts upon which Lord Kenyon's judgment was founded, the point can not be clearly ascertained.

When it was moved that the *cestui que trust* might be made defendant instead of the tenant, and objected to on the opposite side, because he had never been in possession, and could not be considered as a landlord under statute 11 Geo. II, c. 19, s. 13, Lord Kenyon said: "If the person requiring to be made a defendant under the act had stood in the situation of immediate heir to the person last seised, or had been in the relation of remainderman, under the same title as the original landlord, I am of opinion that he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here the very question in dispute between the adverse party and himself, is, whether he is entitled to be landlord or not; and therefore we are not authorized to extend the provision of the statute to such a case as this." The rule was discharged. *Adams on Ejectment*, 288; *Runnigton on Ejectment*, 167.

§ 7. **The Term "Landlord" Extends to all Persons Claiming Title Consistent with the Possession of the Occupier.**—The principle upon which the law is to be interpreted,

¹ *Adams on Ejectment*, 287; *Fairclain v. Shamtitle*, Burr. 1290.

seems to have been established; and we may now consider that the word landlord is extended to all persons claiming title, consistent with the possession of the occupier, and that it is not necessary they should previously have exercised any act of ownership over the lands. Thus the English courts have permitted an heir, who had never been in possession, to defend where the father, under whom he claimed, had died just before, having previously obtained the same rule.¹ So a devisee in trust, not having been in possession, was permitted to defend,² and a mortgagee has been made defendant with the mortgagor;³ but in another case, the court refused to permit a mortgagee to defend, because it did not appear that he was interested in the result of the suit.⁴

Every person may be considered as a landlord, for the purpose of being admitted to defend in ejectment, "whose title is connected to, and consistent with the possession of the occupier." *Stiles v. Jackson ex dem. Ten Eyck*, 1 Wend. (N. Y.) 316.

A person may be admitted to defend as landlord, between whom and the defendant a privity of interest exists, although he does not receive rents, which is not the true test. *Wisner v. Wilcocks*, 1 Cole Cas. (N. Y.) 56.

So the assignee of a mortgagee may be let in to defend. *Jackson v. Babcock*, 17 Johns. (N. Y.) 112.

Where the lessor of the plaintiff claims to recover no more than the interest of the tenant in the premises, subject to the rights of the landlord; or, "claims nothing inconsistent with the rights of the landlord," the landlord will not be let in, for "he has no interest to defend." *Jackson v. Stiles*, 1 Wend. (N. Y.) 103.

But when the lessor, in ejectment, claims an interest inconsistent with the title of the landlord, the latter may defend." *Stiles v. Jackson ex dem. Ten Eyck*, 1 Wend. (N. Y.) 317.

Persons can not be admitted defendants after their agent, whom they permitted to defend for them, has been admitted and confessed a judgment. *Bonta v. Clay*, 5 Litt. (Ky.) 129.

§ 8. The Rule in America—Who is a Landlord within the Meaning of the Rule.—The question is, who is a landlord within the meaning of the rule? The answer is, any person "whose title is connected to and consistent with the possession of the occupier," and when the plaintiff claims an interest in the land inconsistent with the title of such landlord the latter

¹ *Doe v. Roe*, cited 3 T. R. 783.

² *Lovelock v. Dancaster*, 4 T. R. 122.

³ *Doe v. Cooper*, 8 T. R. 685. It does not appear, from the report of this case, whether the mortgagee had

previously received any rent; but, from the principles above laid down, the circumstance seems immaterial.

⁴ *Doe v. Roe*, 6 Bing. 613; *Adams on Ejectment*, 289, 290.

may be let in to defend.¹ A mortgagee, whether in possession or out of possession, is a landlord within the rule,² and the same is true of the assignee of a mortgagee, though out of possession.³ The question as to who is a landlord, and the principles on which he is let in to defend in ejectment, are very fully discussed in the case of *Fairclaim v. Shamtitle*, 3 Burrows' Reports, which is perhaps the most important case on the subject. The principle as laid down in that case, and which seems to have been followed by all succeeding cases, is that where the interests of the party asking to be made a party defendant, or to be let in to defend and the tenant in possession, do not clash, so that they may make inconsistent defenses, and their estates or interests are so connected that it is more for the interest of the applicant that the tenant remains in possession than that he be turned out of it by a title adverse to both, then such party is a landlord within the meaning of the rule, and will be let in to defend in actions of ejectment. The arguments for it are, that it can be no inconvenience to the tenants, prevents collisions between the tenant and third persons, that it is not just to a party whose interests may be materially affected by a proceeding to which he is not a party, and that it is no answer to say that the landlord can himself in turn bring ejectment and recover possession against the plaintiff in the prior suit, for the reason that there is a great difference between plaintiffs and defendants in an action of ejectment.

§ 9. Tenant's Duty to Notify Landlord—Effect of Omission—Practice.—The statutes of many States require a tenant sued in ejectment to give immediate notice to his landlord under a penalty for not so doing. As an illustration we quote the statutes of Illinois and New York.

(1) ILLINOIS.

Every tenant who shall, at any time, be sued in ejectment by any person other than his landlord, shall forthwith give notice thereof to his landlord, or to his agent or attorney, under the penalty of forfeiting two years' rent

¹ *Fairclaim v. Shamtitle*, 3 Burr. 4 T. R. 122; *Stribling v. Prettyman*, 1290; *Williams v. Brunton*, 3 Gil. 57 Ill. 371 (1870).
 (Ill.) 604 (1846); *Adams on Ejectment*, 287; *Stiles v. Jackson*, 1 Wend. (N. Y.) 316; *Driver v. Lawrence*, W. Black. 1259; *Buford v. Gains*, 6 J. J. Marsh. (Ky.) 34; *Norris v. Doncaster*, (N. Y.) 112.
² *Coleman Cases*, 56; *Doe v. Cooker*, 8 T. R. 645; *Jackson v. Stiles*, 11 Johns. (N. Y.) 407.
³ *Jackson v. Babcock*, 17 Johns.

of the premises in question, or the value thereof, to be recovered by such landlord by action of debt, in any court having cognizance thereof.¹

(2) NEW YORK.

Every tenant, to whom a declaration in ejectment, or any other process, proceeding or notice of any proceeding, to recover the land occupied by him, or the possession thereof, shall be served, shall forthwith give notice thereof to his landlord, under the penalty of forfeiting the value of three years' rent of the premises so occupied by him, which may be sued for, and recovered by the landlord or person of whom such tenant holds.²

On receipt of such notice, the landlord can appear and defend in the name of the tenant, or can have himself made a co-defendant. Where a landlord has been thus notified by his tenant or otherwise of the pendency of the suit, and has an opportunity to defend, he must be held to be concluded by a judgment for the plaintiff, and liable to be evicted if the tenant has surrendered possession to him, though the judgment may have been only against the tenant, in name. But this liability to eviction under such a judgment, proceeds not from the idea that the landlord is in possession by a right derived from his own tenant, but from the fact that the action of ejectment must be brought against the person in actual possession, and when brought against a tenant, and the landlord is duly notified, he is to be regarded as really in court, with full power to control the defense so far as may be necessary for his own interests, or to have himself made a party defendant on the record. But if the tenant fails to give his landlord notice of the pending suit, and suffers a judgment to be recovered against himself, can the landlord, to whom the tenant has re-delivered the possession pending the suit, and who has no knowledge of such suit, or opportunity of asserting his rights, be evicted by a writ of possession issued on the judgment against the tenant? This would violate that most familiar principle of law and justice which forbids the rights of any person to be taken away without a hearing. If it should be made clearly to appear that the landlord had no notice of the suit, and if chargeable with no fault or *laches*, the court, on motion, would stay the writ of possession as against him. This, however, should be done without impairing the right of the plaintiff, by compelling him to bring a new suit. A bar, under the statute of limitations, might

¹ R. S. Ill. 1845, 324, § 5; Starr & Curtis' Statutes, 984, § 17.

² R. S. N. Y., Part 2, Ch. 1, Tit. 4, § 21.

prevent his recovery in a new suit, but not be available as a defense in the suit already instituted. The writ of possession should therefore be stayed on the motion of the landlord, only until he can be made a party to the record, in the existing suit, and a trial be had upon the merits. The parties will then occupy the same position they would have held if the landlord had received notice of the suit before judgment passed against the tenant. He will have an opportunity to be heard before losing his property, and the plaintiff will have the benefit of his suit against the tenant in the determination of any questions that may arise under the statute of limitations.¹

§ 10. A Tenant's Right to Attorn after Notifying His Landlord.—A tenant who has been evicted in fact, or against whom a judgment of eviction has been rendered in favor of a third person, may attorn to such person, or purchase his title, and set it up against his landlord, yet this can not be true, if such eviction or judgment of eviction is in any degree attributable to a neglect of the tenant's duty to his landlord. The tenant can not be permitted to take advantage of his own wrong. One of his duties, existing at common law, and expressly enjoined by statute, under a penalty of forfeiting rent, is that, when sued in ejectment, he shall notify his landlord of such suit. The performance of this duty is of the last importance to the landlord. If the tenant does perform it, and the landlord fails to protect him in his possession, he may then protect himself by purchasing the paramount title, or by taking a lease under it. But if he neglects this duty, and thereby prevents the landlord from protecting either the tenant's possession or his own reversion, he is guilty of practical bad faith, and when called upon by the landlord to surrender back the possession, he can not be permitted to refuse to do so under the plea that he has been evicted by a paramount title, under which he now claims to hold. Although a tenant may attorn to a purchaser of his landlord's title, or purchase it himself, if sold under judgment and execution, yet all the authorities concur in saying that he can not attorn to a stranger, or purchase and set up his title, although it may be the paramount title. This is among the most familiar rules of the law.² We are

¹ Lawrence, J., in *Oetgen v. Ross*, 47 Ill. 143, 1863; *Probasco ads. Jackson*, 48 Ill. 160 (1863); see *Foster v. son, ex dem.*, etc., 1 Wend. (N. Y.) 316. *Morris*, 3 A. K. Marsh. (Ky.) 609,

wholly unable to perceive any difference in principle between a voluntary attornment to a stranger without suit, and the neglect to give the landlord an opportunity to defend when suit is brought, and an attornment to the plaintiff in the ejectment after recovery. In both cases there is a want of that fealty to the landlord which the relation requires. In both cases the tenant is jeopardizing the landlord's title. In the one case, he does what the law forbids; in the other, he neglects what the law requires. In one case he gives to a stranger a possession he is bound to keep; in the other he permits it to be taken from him without allowing his landlord the right to defend it. Although a stranger who, without collusion with the tenant, has obtained a judgment against him, may enter and set up his title against the landlord, notwithstanding the latter had no notice, yet the security of property imperatively requires that no such privilege shall be accorded to the tenant. He can not refuse to deliver back the possession on the ground that he holds under, or has acquired, the title of the plaintiff in the ejectment. Nor is it material that he is able to show that such title is the paramount title. Whatever it may be, he can not set it up against his landlord, until he has restored the possession he received from him. The landlord can not be required to litigate that title with the tenant, except upon the vantage ground of that possession which belongs to him.¹

§ 11. **An Attornment—The Term Defined.**—Briefly defined an attornment was the act of a feudatory, vassal or tenant by which he consented upon the alienation of an estate to receive a new landlord, or superior, and transferred to him his homage and service. By the feudal law it was the act of turning or transferring homage and service from one lord to another upon the alienation of the estate, but under our modern law it is understood as being the act of becoming tenant or turning the rent, etc., to a new landlord who has come into the estate by alienation or other lawful means.²

and Lumsford v. Turner, 5 J. J. Marsh. (Ky.) 108, which have been cited as laying down a different rule. In one of these cases the landlord evidently had notice. In the other it does not appear whether he had or not.

¹ Lawrence, J., in *Lowe v. Emerson*, 50 Ill. 160 (1868).
² 2 Blackstone's Com. 72, 288, 290; Burrill's Law Dictionary, Title "Attornment"; Webster's Dictionary, Title *Attorn and Attornment*.

§ 12. **The Practice—Motion of Landlord To Be Made a Party.**—When the party who wishes to be made defendant is not the tenant, or actual landlord, but has some interest to sustain, the court must be moved, on an affidavit of the facts, to permit him to defend with, or without the tenant, as the case may require.¹ In many States the practice in matters of this kind is regulated by statutes.

Form of rule in Q. B. for admitting the landlord to defend, etc.

Doe, on the demise of A. B. v. { It is ordered that E F, landlord of the
Roe } tenant in possession of the premises in
question in this cause, shall be joined and made defendant with the said
tenant, if he shall appear. And the said E F desiring, if the said tenant
shall not appear, that he may appear by himself, and consenting that in
such case he will enter into the common rule to confess lease, entry and
ouster, in such manner as the said tenant ought, in case he had appeared;
(or if the rule be special, to confess lease and entry only, say "to confess
lease and entry only, without ouster, unless an actual ouster of the lessor
of the plaintiff, by the said C D, or those claiming under him, he proved at
the trial,") leave is given to the said E F, pursuant to the late act of Parlia-
ment, if the said tenant shall not appear, to appear by himself, and upon
his entering into such common rule, to become defendant instead of the
casual ejector, and to defend his title to the said premises without the said
tenant; the plaintiff nevertheless is at liberty to sign judgment against the
casual ejector; but execution thereon is stayed, until the court shall further
order. Upon the motion of Mr. ———

By the Court. .

Adams on Ejectment, 474.

§ 13. **A Question of Practice—Lord Mansfield.**—The Court of King's Bench in the case of Fairclaim v. Shamtitle threatened to exercise a stringent act of equitable jurisdiction, with respect to the admission of a person claiming title, to defend an ejectment. The action was brought by one claiming as the heir of a copyholder; and the lord of the manor, claiming by escheat *pro defectu hæredis*, obtained a rule to show cause why he should not be admitted a defendant. After considerable argument as to the legality of the lord's claim to defend, it was agreed by both parties, at the recommendation of the court, that the then ejectment should be discontinued, and a fresh one brought in the lord's name, in which the heir should be admitted defendant; and Lord Mansfield declared afterward, that if the heir had refused to consent to this arrangement, they would have admitted the lord to defend; if the lord

¹ Adams on Ejectment, 292.

had refused his consent, they would have discharged the rule.¹

A wife has been permitted to defend, where the title of the plaintiff's lessor arose from a pretended intermarriage with her, which marriage she disputed. *Fenwick v. Gravenor*, 7 Mod. 71.

But a parson, claiming a right to enter and perform divine service, has been held not to have a sufficient title to be admitted defendant. *Martin v. Davis*, Strad. 914; see *contra*, *Hillingsworth v. Brewster*, Salk. 256.

And where the application for admission appeared only a device to put off the trial, the court refused to grant a rule. *Fenwick's case*, Salk. 257.

§ 14. Courts Exercise Equitable Jurisdiction over the Writ of Possession.—In the action of ejectment, the court rendering the judgment exercises a species of equitable jurisdiction over the writ of possession, recalling it if justice requires, and sometimes after it has been executed, awarding a writ of restitution.²

§ 15. The Remedy Where the Rule is Improperly Granted.—If a party should be admitted to defend as landlord whose title is inconsistent with the possession of the tenant, the lessor may apply to the court, or to a judge at chambers, and have the rule discharged.³ If, however, he neglect to do so, and the party continue upon the record as defendant, such party will not be allowed to set up such inconsistent title as a defense at the trial.⁴

§ 16. Statutory Provisions—Duty of Tenant When Sued in Ejectment—Landlord To Be Made a Party.

(1) ALABAMA.

SECTION 2700. *Landlord made party on motion.* When the suit is against a tenant, the landlord must be made a defendant to the suit on motion of the tenant, or upon the landlord's application in writing, supported by affidavit that the defendant is his tenant by demise in writing, or is in the occupancy of the land sued for with his consent, or of some portion thereof, which must be specified in the application.

Code of Alabama, 1886, Vol. 1, Ch. 6, § 2700; *McCaskel v. Amarine*, 12

¹ *Adams on Ejectment*, 290; *Fair-claim v. Shaintitle*, Burr. 1290.

³ *Adams on Ejectment*, 290; *Doe v. Lippencott*, Coram Wood, B. Trin.

² *Oetgen v. Ross*, 47 Ill. 147 (1868); *Vac.* 1817, MS.; *Doe v. Rys*, 2 Y. & J. Coleman v. Henderson, 2 Scam. (Ill.) 88.

⁴ *Adams on Ejectment*, 290; *Doe v. Y.* 500; *Jackson v. Hasbrook*, 5 John. Lady Smythe, 4 M. & S. 447; *Doe v. (N. Y.)* 366; *Doe ex dem. Traughton* Litherland, 4 Ad. & Ell. 784.
v. Roe, 4 Burr. 1996.

Ala. 18; *Falkner v. Keith*, Ib. 165; *Noble v. Coleman*, 16 Ala. 77; *Ex parte Webb*, 58 Ala. 109.

(2) DELAWARE.

SECTION 2. *Landlord admitted to defend on terms.* If a tenant holding under a demise, be served with a declaration in ejectment, his landlord, upon entering into the common rule, shall be admitted defendant with the tenant in such ejectment. If the tenant refuse to appear, and the landlord apply to be admitted defendant, judgment shall be entered against the casual ejector, with stay of execution subject to the order of the court; and the landlord, on entering into the common rule and admitting on record that he is, and at the time of commencing the action, was, in the possession of the premises mentioned in the declaration, or any described part thereof for which he defends, shall be admitted defendant.

R. S. Del., Ch. 119, 706.

(3) INDIANA.

SECTION 1051. *Landlord, when substituted — Notice.* Whenever it appears that the defendant is only a tenant, the landlord may be substituted, reasonable notice thereof being given.

Sec. 1052. *Landlord, when bound.* In an action against a tenant, the judgment shall be conclusive evidence against the landlord who has received notice as hereinbefore provided.

R. S. Ind. 1881, Art. 38.

(4) IOWA.

SECTION 3253. *Landlord substituted for defendant.* Whenever it appears that the defendant is only a tenant, the landlord may be substituted by the service upon him of original notice, or by his voluntary appearance, and the judgment shall be conclusive against him.

2 McClain's Statutes, 857.

The statute is only permissive. It does not require the landlord to be made a party.

State v. Orwig, 34 Iowa 112, (1871).

(5) MISSISSIPPI.

SECTION 2482. *Landlord notified and admitted to defend.* Every tenant, sued in ejectment, shall forthwith give notice to his landlord, under penalty of three years' rent of the premises, to be recovered by the landlord or his representatives, in

an action; and the landlord of such tenant, or any other proper person, shall, by leave of the court or judge, be admitted to appear and defend the action, in all cases where the same would have been allowed heretofore, and either separately or jointly with the tenant; and any person admitted to defend the landlord, in respect of property whereof he is in possession only by his tenant, shall state in his plea, that he defends as such landlord, and such person shall be allowed to set up any defense he has heretofore been allowed to set up, and no other; and any judgment in such action, shall have the same effect.

Rev. Code Miss. 1880, 671.

(6) NEW JERSEY.

SECTION 8. *Tenant to notify landlord.* Every tenant, on whom any summons of ejectment shall be served for any lands, tenements or hereditaments in his possession shall forthwith give notice thereof to his landlord, or his agent or attorney, under the penalty of forfeiting the value of three years' rent of the premises, in the possession of such tenant, to the person of whom he holds, to be recovered by action of debt in any court of record in this State.

R. S. N. J. 1877, Title Ejectment, 326.

(7) OREGON.

SECTION 317. *Substitution of landlord as party in place of tenant.* A defendant who is in actual possession may, for answer, plead that he is in possession only as tenant of another, naming him and his place of residence, and thereupon the landlord, if he apply therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him. If the landlord do not apply to be made defendant within the day, the tenant is allowed to answer; thereafter he shall not be allowed to, but he shall be made defendant if the plaintiff require it. If the landlord be made defendant on motion of the plaintiff, he shall be required to appear and answer within ten days from notice of the pendency of the action and the order making him defendant, or such further notice as the court or a judge thereof may prescribe.

R. S. Oregon, Ch. IV, Title 1, § 317.

(8) TENNESSEE.

SECTION 3956. *Landlord may appear.* When the suit is against a tenant by a party claiming adversely to the title of his landlord the landlord may appear and be made a defendant with, or in the place of, the tenant.

Millikin & Vertree's Code of Tennessee 1884, page 762, § 3956.

(9) PENNSYLVANIA.

SECTION 2. *Tenants to give notice to their landlords.* Every tenant to whom any (declaration) ejectment shall be delivered for any lands, tenements or hereditaments, within this province, shall forthwith give notice thereof to his or her landlord or landlords, or his, her or their bailiff, receiver, agent or attorney, under the penalty of forfeiting the value of two years' rent of the premises so demised or holden in the possession of such tenant, to the person of whom he or she holds; to be recovered by action of debt to be brought in any of the courts of common pleas within this province, wherein no esoin, protection or wager of law shall be allowed nor any more than one imparlance.

Sec. 3. *Landlords to be admitted to defend.* It shall and may be lawful for the court where such ejectment shall be brought, to suffer the landlord or landlords to make him, her or themselves defendant or defendants by joining with the tenant or tenants, to whom such declaration in ejectment shall be delivered, in case he or they shall appear, but in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed (against the casual ejector), for want of such appearance; but if the landlord or landlords of any part of the land, tenements or hereditaments, for which such ejectment was brought, shall desire to appear by himself or themselves (and consent to enter into the like rule, that by the course of the court, the tenant in possession, in case he or she had appeared, ought to have done), then the court, where such ejectment shall be brought, shall and may permit such landlord so to do, and order a stay upon such judgment (against the casual ejector) until they make further order therein.

1 Brightly's Purdon's Digest, 531.

CHAPTER X.

PLEADINGS IN ACTIONS FOR THE RECOVERY OF LANDS.

- § 1. The First Pleading on the Part of the Plaintiff.
- 2. Title of the Court and Names of the Parties.
- 3. Description of the Premises.
- 4. Purposes of the Description.
- 5. Certainty by Reference to Other Deeds.
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- 10. Conclusion and Prayer for Relief.
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- 14. The Defendant's Pleadings.
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- 18. Pleading the Statute of Limitations.
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- 20. The Statute of Limitations in Real Actions.
- 21. The Statute Distinguished.
- 22. Persons Under Disability.
- 23. Pleading a Tax Title.
- 24. Precedents of Defendant's Pleas.
- 25. Synopsis of Statutory Provisions.

§ 1. The First Pleading on the Part of the Plaintiff.—

Under the modern rules of practice, the first pleading on the part of the plaintiff in actions of ejectment is designated in some States as the declaration; in others, the complaint or petition. As a general rule, it may be laid down that the essential parts of this pleading are:

(1) The title of the court and the real names of the parties litigant, plaintiff and defendant.

(2) A description of the premises sought to be recovered, sufficiently certain to identify the same, so that from such description the possession may be delivered.

(3) The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate, and in case of an undivided interest the amount of the same.

(4) That the plaintiff was in possession of the premises in dispute or that he is entitled to such possession.

(5) That the defendant unlawfully entered upon and dispossessed him of such premises with the date thereof, and that he withholds from him the possession of the same.

(6) If rents and profits or damages are claimed, the pleading must contain sufficient allegations to show that the plaintiff is entitled to the same.

(7) The conclusion, prayer for relief, etc.

§ 2. **Title of the Court and Names of the Parties.**—The title of the court is required to be stated with the venue. The names of the parties litigant, plaintiff and defendant, are in law understood as the full Christian name prefixed to the surname of the party. Initials and middle names are not ordinarily recognized in law. The addition of the words junior and senior to the name of a party being a mere matter of description, forms no part of the legal name.¹

§ 3. **Description of the Premises.**—The object of the description is the identification of the lands; and if the description is sufficiently certain for this purpose, it is sufficient for all purposes. Lord Mansfield said:

“A *præcipe* in a real action requires exactness and precision; but an ejectment is a fictitious action, contrived for ease, dispatch and saving expense; and has, of later times, been taken with more latitude than formerly. And though it has been often said, ‘that the descriptions ought to be so certain that the sheriff may be able to know, without any information from the plaintiff, what he is to give possession of,’ yet, in truth and fact, the sheriff delivers possession at the showing of the plaintiff, and at the peril of the plaintiff, who is, at his peril, to take possession of no more than he is entitled to.”²

§ 4. **Purposes of the Description.**—In actions of ejectment there can be but two purposes in stating the description of the premises sought to be recovered. (1) To enlighten the defendant as to what land is claimed. (2) To enable the sheriff to

¹ Ford v. Doyle, 37 Calif. 346.

² Connor v. West, 5 Burr. 2672; Johnson v. Neville, 65 N. C. 677.

determine from the execution itself of what premises he is to put the plaintiff in possession. Though these statements seem plausible, yet their weight is much diminished by the reflection, that however particular and definite a description may be, it always requires some evidence outside to enable a stranger to apply it to the lands intended; so that even in such a case, the sheriff is obliged either to satisfy himself of the identity of the land, by witnesses, or to act on the representations of the plaintiff. It has, therefore, become the modern practice for the plaintiff, at his peril, to point out the land recovered, to the sheriff, who puts him in possession accordingly. Such a practice sometimes produces inconvenience, as when the plaintiff seeks to obtain possession of more or other land than he has recovered. But, in such a case, the court will always interfere and restrict the action of the sheriff under the writ, to the land to which the plaintiff proved title on the trial. It was found by experience that the contrary course of requiring a precise and minute description of the land, in the declaration, was attended with inconveniences vastly greater. If a description be minute, it must be proved with exactness, or else the minuteness only misleads. Under such a rule, there is constant danger that a plaintiff may lose his cause from a variance in minute particulars, not entering into the merits, and the delay and expense of trials is greatly aggravated. To avoid these evils, the constant tendency of the modern practice has been to reduce the certainty required in pleading within the more moderate limits which experience has shown to be reasonable and convenient.¹

Sufficient descriptions.

A description of the land sued for as "the fractional northeast quarter of section 36, in township 33 north, of 4 west, lying south of the Kankakee river, in Starke county, Indiana," is sufficient.

And so is the description "all that part of the fractional northeast quarter of section 36, in township 33 north, of range 4 west, which lies south of the middle line of the Kankakee river, in Starke county, Indiana." *Sphung v. Moore*, 120 Ind.127; 22 N. E. Rep. 319 (1889).

A description of land, in a tax receipt or deed, as the "North side S. W. $\frac{1}{4}$ of block 2," etc., is not void for indefiniteness and uncertainty. Those words mean the north half of the southwest quarter of the lot. Mathematical accuracy is not indispensable and descriptions are not to be rejected because they are awkwardly and inaptly expressed. If, taking the language in the connection in which it is used, the meaning is reasonably clear to the ordinary apprehension it is sufficient. *Winslow v. Cooper*, 104 Ill. 235.

¹*Johnson v. Neville*, 65 N. C. 677.

A complaint alleging that plaintiff is the owner and entitled to the possession of a tract of land, describing it, and that defendant is unlawfully in possession of a part thereof without specifically defining which part, is sufficient. *Speight v. Jenkins*, 99 N. C. 143; 5 S. E. Rep. 385.

Where the complaint alleges that the demanded premises are in Susanville it is not objectionable because it does not allege that they are in Lassen county, where the action is brought, as the court will take judicial notice that Susanville is in Lassen county, under the provision of Code Civil Proc. Cal. § 1875, subd. 2, that courts take judicial notice of whatever is established by law. *Cole v. Segraves*, 88 Cal. 103; 25 Pac. Rep. 1109.

Insufficient descriptions.

Plaintiff claimed the possession of certain lots and blocks in Lane's addition to Pleasant Hill, describing them by their numbers. The addition was surveyed and platted in 1871, after which the proprietor sold the lots described in plaintiff's petition, and which had been conveyed to plaintiff. The plat is described by the record as being south and west of the original town of Pleasant Hill, "on southeast $\frac{1}{4}$ of section 9, town seven (7), range three (3), east Saline county, Nebraska." No other description, location or monuments are given. There is no plat of the original town of Pleasant Hill. The certificate of the surveyor described it as "part N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ Sec. 9, T. 7, R. 3 east, * * * W. C. 50 links S.; N. E. corner of S. E. $\frac{1}{4}$ walnut stake 2 inches square, one foot long, var. $10^{\circ} 30'$ east." No other description or monuments are given. In 1877 the proprietor sold and conveyed to defendant the land on which the survey had been made, describing it by the government survey, and not as a platted town. At that time and prior thereto, the land was used as a farm, and has so been used by defendant since his purchase until the commencement of this action.

It was held that, as the lots were incapable of identification, plaintiff could not recover. *Lane v. Abbott*, 23 Neb. 489; 37 N. W. Rep. 82.

Where a petition for the recovery of real estate, after describing by metes and bounds a tract of land containing 150 acres, recites that defendants held possession "of a portion of said land on the east side of the above survey, to wit, — acres thereof, without right," etc., the description is insufficient, and a verdict on issue tendered by such petition should be set aside. *Smith v. Price* (Ky.), 7 S. W. Rep. 918 (1888).

"Five acres S. 24, T. 4, Fr. R. 1, Cincinnati, value \$830." This is to be read substantially "five acres in section 24, fractional range 1, Cincinnati, valued at \$830," and is insufficient. The uncertainty of description which renders the title void, consists in its being wholly impossible to know in what part of the section this particular lot of five acres is located. Entire sections contain 640 acres, and these five acres so far as appears, may as readily be in one part as another. *Raymond's Lessee v. Langworth*, 14 How. (U. S.) 76 (1852).

In a French grant, 1722, the description was as follows:

"One league and half of ground fronting on the Little Maramecq, on the river Maramecq, at the place of the first arm (branch or fork) which leads to the collection of cabins, called the *cabonage de la Renaudiere*, by six leagues (eighteen miles) in depth, the river forming the middle of the point of compass, and the streamlet being perpendicular as far as where Mr. Renault has his furnace; and thence straight to the place called the Great Mine."

On the trial, the fork of the Little Maramecq, so called, and the old furnace on it and the great mine were proved to exist, but the court was of the opinion that the grant was void for uncertainty. *Denise v. Ruggles*, 16 How. (U. S.) 242 (1853).

The description in the declaration, and in plaintiff's chain of title, of the land sought to be recovered in ejectment, as the "north part of the southwest quarter of lot two," is insufficient. *Lazar v. Caston*, 67 Miss. 275; 7 So. 321.

§ 5. **Certainty by Reference to Other Deeds, etc.**—Cases are frequently found in the books in which the question arises of the certainty of the description of premises conveyed in a deed where the only means of determining what in fact is conveyed is by reference to some other deed, conveyance or purchase. The general rule in such cases seems to be well settled that the deed, conveyance or purchase to which reference is made must be produced on the records thereof. Parol evidence is not admissible to show what land was intended to be conveyed.¹

But where the language of a deed is doubtful as to the land conveyed, parol evidence of the practical interpretation of the doubtful description by the acts of the parties is admissible to remove the doubt.²

Parol evidence, however, is inadmissible to show that a part of the premises contained in a deed were intended to be excepted from the grant.³

Where, in an action for the recovery of real estate, the complaint simply alleges title in plaintiff, without stating the source, the issues submitted to the jury should be so framed as to allow plaintiff to prove title in any manner he can; and when the plaintiff tenders such issues, properly

¹ Where a deed contained this description, "All that certain tract or parcel of land situate in the town of Charleston, county of Ontario and State of New York, to contain all the land lying on the north side of the State highway that I purchased of Richard McCurdy, supposed to contain about one hundred acres of land to be the same more or less, together with the house and barn," it was held that parol evidence to show the land intended to be granted was not admissible; the deed of McCurdy showing what was purchased must be produced. *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 369.

² *Livingston v. Ten Broeck*, 16 John. (N. Y.) 14; *Whitnell v. Gartham*, 6 T. R. 388; 1 *Greenleaf Ev. Sec.* 293; *Allen v. Kingsbury*, 16 Pick. (Mass.) 239; *Choate v. Burnham*, 7 Pick. (Mass.) 274; *Cambridge v. Lexington*, 17 Pick. (Mass.) 222; *Stone v. Clark*, 1 Met. (Mass.) 378; *Merriam v. Harsen*, 2 Barb. Ch. 232; *Farrar v. Stackpole*, 6 Greenl. (Me.) 154; *Haydon's Appeal*, 3 Co. 7; *Wells v. Porter*, 2 Bing. N. C. 729; *Devonshire v. Lodge*, 7 B. & C. 36, 39, 40; *Chad. v. Tilsed*, 2 B. & B. 403; *Attorney Gen. v. Boston*, 9 Jur. 838.

³ *Jackson v. Croy*, 12 Johns. (N. Y.) 427.

framed, it is error to refuse them, and to submit, instead, issues which, though proper in themselves, narrow the question to the chain of title stated in defendant's answer as the one through which plaintiff claims, although plaintiff may have put in evidence no deeds other than those so referred to in defendant's answer. *Davidson v. Gifford*, 100 N. C. 18; 6 S. E. Rep. 718 (1888).

§ 6. Statement of the Plaintiff's Interest in the Premises.—The law requires the plaintiff to allege in his pleading his interest in the premises in controversy at the time of the commencement of the suit or at the time of the wrongful entry by the defendant. Whether it be a fee simple or other estate it should be stated with reasonable certainty.¹

§ 7. Statement of the Plaintiff's Prior Possession.—The prior possession of the plaintiff or his entry upon the premises as it was called under the old practice should be alleged in the complaint, but it need not be laid upon any particular day. It is sufficient if it be stated generally.²

A complaint in ejectment alleged that one W. died seized in fee of certain premises, leaving brothers and sisters as his heirs; that one of the brothers died leaving children, of whom plaintiff was one, as his heirs; and "that by reason of the matters hereinbefore set forth," plaintiff was seized in fee of a certain undivided part of the premises. *Held*, a sufficient averment of title. *Masterson v. Townshend*, 23 N. Y. St. Rep. 626; 5 N. Y. Sup. 182.

Under Comp. Laws Ariz., p. 267, § 114, giving to the administrator the right to the possession of all the real estate of his intestate, his title is sufficiently alleged in a complaint in ejectment by an averment that "as administrator he is seized in fee, and entitled to the possession of the premises," though no possession, nor right of possession, in his intestate is averred. *Oury v. Duffield*, 25 Pac. Rep. 533; 1 Ariz. 509.

A complaint averring that plaintiff "is seized in fee and possessed of, and entitled to the possession and occupation of a certain tract or parcel of land," is sufficient, without stating how he became seized. *Billings v. Sanderson*, 8 Mont. 201; 19 Pac. Rep. 307.

A complaint which avers seizin and possession, and that while so seized and possessed defendants entered and ousted plaintiff, together with appropriate averments as to description, time, place and damage, states facts sufficient to constitute a cause of action. *Ibid*.

§ 8. The Entry and Ouster—Unlawful Entry of the Defendant.—Another essential element of this pleading is the statement of the defendant's unlawful entry upon the premises in question, and the dispossession or ouster of the plaintiff. The allegation is quite formal, and it is not necessary that it

¹ *Holt v. Rees*, 44 Ill. 30; *Armstrong v. Hines*, 8 Minn. 254; *Stienbark v. Fitzpatrick*, 12 Calif. 295; *Wakely v. Warren*, 2 Roll. 466. ² *Chitty's Pleadings*, 881, note o; *Adams on Ejectment*, 221, 222; *Marshall v. Shafter*, 32 Calif. 176.

be alleged to have taken place on any particular day. Under the old practice it was requisite that the date should be charged as being after the lease and entry supposed, in order to support the consistency of the fiction; for, as the title of the plaintiff was supposed to arise from the lease mentioned in the declaration, it would be absurd for him to complain of an injury to his possession before he had, by his own showing, any claim to be possessed. It seems, however, not to be absolutely necessary that this consistency should be preserved; for as the words "afterward, to-wit," are always used immediately before mentioning the day of the ouster, it is probable, upon the principles by which ejectments are at present regulated, that the courts would in all cases consider an ouster laid previously to the day of the entry, as impossible and repugnant, and as such reject it.¹

A complaint in ejectment, filed December 4, 1889, which alleges that on December, 20, 1888, plaintiff was the owner and in possession of the premises sued for, and "that on the 24th day of December, 1889, plaintiff being so seized and possessed, defendant wrongfully entered and ousted plaintiff from the possession thereof, and now withholds wrongfully the possession," is not objectionable on general demurrer as alleging ouster subsequent to the filing of the complaint, as it is evident that this was a clerical error merely, and is inconsistent with the allegation that defendant "now withholds," etc. *Cole v. Segraves*, 88 Cal. 103; 25 Pac. Rep. 1109.

§ 9. Allegation for Rents, Profits and Damages.—There is but little uniformity among the States upon the question of the recovery of rent and profits, or as they are more commonly called mesne profits, or damages for use and occupation. In the ordinary acceptation of the terms, mesne profits and damages, are distinct and separate causes of action.² In many jurisdictions, however, both claims may be joined with the demand for the possession, and upon a verdict for the plaintiff upon the main issue the jury may assess the damages up to the day of the trial.³ The statement for mesne profits and damages is quite formal and exceedingly simple.

¹ *Adams v. Goose*, Cro. Jac. 96; 382; *Vandevoort v. Gould*, 36 N. Y. Davis v. Purdy, Yelverton, 182; Tyler 639; *Livingston v. Tanner*, 12 Barb. on Ejectment, 398; *Miller v. Shackelford*, 4 Dane (Ky.) 264; *Lynn's Lessee v. Downes*, 1 Yeates (Penn.) 518. *Wise*, 53 Ind. 32; *Bell v. Medford*, 57

² *Larned v. Hudson*, 57 N. Y. 151. *Miss.* 31; *Lord v. Dearing*, 24 Minn.

³ *Beard v. Federy*, 3 Wall. (U. S.) 110; *Emrich v. Ireland*, 55 Miss. 390. 478; *Woodhull v. Rosenthal*, 61 N. Y.

§ 10. **Conclusion and Prayer for Relief.**—In those jurisdictions where the judgment in the action is for the recovery of the possession of the lands in controversy the prayer for judgment is very simple, but where mesne profits and damages are allowed to be recovered in the same action, some care must be taken to properly express the demand, especially where special damages are sought to be recovered. In those jurisdictions where the distinctions between law and equity are abolished and the action assumes more or less of the form of a suit in equity, the prayer for relief must be governed by the rules of equity pleading. The right to recover substantial damages in actions of ejectment did not exist at common law, and we must look to the statutes of the several States for our guide in this matter.

Where the complaint contains proper averments to entitle plaintiffs to possession and a general prayer for relief, and there are an appearance, trial, and finding that plaintiffs are the owners and entitled to possession, and defendant is in the unlawful possession, judgment for possession is proper, though there is no specific prayer therefor. *Evans v. Schafer*, 119 Ind. 49; 21 N. E. Rep. 448.

A complaint in ejectment is not demurrable for improperly uniting several causes of action, because, in addition to the usual allegations and prayers in ejectment, it alleges that defendant claims title, and asks to have his pretended title canceled of record, no specific claim of defendants being stated, and it not being pretended that plaintiff is in possession, as such being the case, a good cause of action is not stated in anything but ejectment. Neither will a claim and prayer for damages for waste *pendente lite* make a complaint in ejectment demurrable. *Hiles v. Johnson*, 67 Wis. 517; 30 N. W. Rep. 721 (1887).

§ 11. **Practical Suggestions.**—It is impossible to present any set of precedents applicable to the rules and requirements of the several States. The best that can be done is probably to present a set of forms, prepared with great care, and sanctioned by the Supreme Court of the State of New York as a basis. The practitioner can easily modify them so as to make them conform to the practice of any of the States.¹ The practitioner should never draw a complaint or declaration in ejectment from a given precedent without first examining the statute of his own State to see if the precedent complies with its provisions.

He should never lumber up an allegation with matter which is certainly needless, nor should he take any risks by omitting an allegation where doubts may arise as to its materiality.

¹ Waterman's Adams on Ejectment, 483.

Where a statute requires certain matters to be stated, it is always the true rule in stating them to use the exact language of the statute. It is dangerous to experiment with other words which he may deem sufficient as substitutes.

A careful pleader will guard every expansion beyond the statutory words in order not to incumber his pleading with needless matter, so as to render it incumbent on him to prove it.

When the pleading is finished test its sufficiency by the following questions :

(1) Are the title of the court and the names of the parties litigant, plaintiff and defendant, properly stated ?

(2) Are the premises sought to be recovered properly described ?

(3) Is the plaintiff's interest in the premises in question sufficiently stated ?

(4) Is the plaintiff's prior possession or right to the possession sufficiently stated ?

(5) Is the entry of the defendant and the ouster of the plaintiff properly stated ?

(6) Is the venue properly laid ?

(7) Is the prayer for judgment or relief sufficiently definite and particular ?

§ 12. **Amendment of the Complaint.**—Under the modern procedure the rule allowing amendments of pleadings is very liberal. So, where a mistake has been made in stating the description of the premises sought to be recovered, it may be cured by amendment.¹

Plaintiff in ejectment can not amend the declaration by a prayer that one of the defendants be decreed to perform specifically a parol agreement for a gift of the premises in dispute, without alleging that such defendant is a resident of the county in which the suit is pending, or a non-resident of the State. *Johnson v. Griffin*, 80 Ga. 551; 7 S. E. Rep. 94.

Refusal to allow an amendment claiming special damages in ejectment is immaterial, when it appears that plaintiff had no right of possession when action was brought. *Horner v. Marietta*, 135 Pa. St. 418; 19 Atl. Rep. 1029; Am. Dig. 1890, 1175.

In ejectment plaintiffs claimed twenty-five acres of land under a deed from the purchaser thereof in foreclosure. Defendant held the property

¹ Where the declaration and the lot No. 69, the declaration may be deeds under which both parties claim amended accordingly. *Polhill v. describe the land as "lot No. 59, Brown*, 84 Ga. 338; 10 S. E. Rep. known as the 'Davis Place,'" and it 921. is shown that the Davis place was

under a prior deed from the mortgagor's grantee, who had assumed payment of the mortgage. The evidence showed that fourteen of the twenty-five acres were not covered by the mortgage: *Held*, that plaintiffs were entitled to recover the remaining eleven acres not included in the mortgage, without amending their complaint. *Barley v. Roosa*, 59 Hun, 617; 20 Civ. Proc. R. 13 N. Y. Sup. 209.

Plaintiff having improperly brought his action to recover land in equity, it was transferred to the ordinary docket. Plaintiff then filed an amended petition stating a cause of action in ejectment, and defendant filed an answer to it: *Held*, that it was open to plaintiff to prove any facts alleged in the amended petition additional to those contained in the original petition, and not inconsistent with the allegations of the latter, and that a demurrer to the amended petition was improperly sustained. *Julian v. Stephens* (Ky.), 3 S. W. Rep. 596; Am. Dig. (1887) 385.

After two trials in ejectment, in which the defense is adverse possession, an amendment introducing a new party plaintiff is improperly allowed, both because of the *laches* of plaintiff in making the motion to amend, and because on a new trial, to which defendant is entitled as a matter of right, a new issue will be presented as to whether adverse possession can be shown as against the new party. *Crowley v. Murphy*, 32 N. Y. St. Rep. 114; 10 N. Y. Sup. 698.

Defects in the declaration, which are merely formal, will be cured by a verdict, or by a judgment by default and writ of inquiry executed. *Higgins v. Highfield*, 13 East, 407.

§ 13. Approved Precedents of Plaintiff's Pleas.

No. 1.

Declaration in ejectment for the entirety; where the plaintiff claims in fee; or, for his own life; or, for that of another.

SUPREME COURT.

Of the term of ———, in the year of
our Lord, one thousand eight hundred
and

County of ———, to wit: A B, by E F, his attorney, complains of C D, &c. For that, whereas the said A B, on the
day of ———, in the year of our Lord one thousand
eight hundred and ——— [*some day after the title accrued*], was
possessed of a certain dwelling-house and garden, [*or "of a certain lot of wood land;" or, "of a certain orchard;" or otherwise, as the case may be,*] with the appurtenances, situate in the
town of ———, in the said county of ———, and being known
and designated as lot [*or, "as parcel of lot," or, "as subdivision number ——— of lot,"*] number ———, in ———, range of townships
of a certain tract of land called and known ———, Patent,
[*or "Purchase," or, if the premises can not be so described,*

then say, "and adjoining northwardly, to lands late in the occupation of G H; southwardly, to lands late in the occupation of J K; eastwardly, to lands late in the occupation of L M; and westwardly, to lands late in the occupation of N O;" or, if there have been no occupants of such adjacent lands, then stating the natural boundaries, if any; and if none, describing such premises by metes and bounds; or in some other way, so that from such description, possession of the premises claimed may be delivered,] which said premises the said A B claims in fee; [or, "for his own life;" or, "for the life of one R S," as the case may be], and he, the said A B, being so possessed thereof, the said C D, afterwards, to wit, on the — day of —, in the year of our Lord one thousand eight hundred and —, entered into the said premises, and ejected the said A B therefrom; and unjustly withholds from the said A B, the possession thereof; to the damages of the said A B of — dollars; [any nominal sum that the plaintiff shall think proper to state;] and therefore he brings his suit, &c.

E F, Attorney for Plaintiff.'

No. 2.

The like, for an undivided share or interest.

[As in No. 1 to and including the words, "was possessed of" and then proceed as follows:] the one equal undivided moiety, [or, "the one equal undivided third (or fourth or other) part" according to the share and interest the plaintiff claims] of a certain dwelling house and gardens, &c., [describing the premises as directed in No. 1,] which said premises the said A—B—, claims in fee [or for his own life or for the life of one R—S—, according as the case may be]; and he the said A B being so possessed thereof, the said C D afterwards, to wit: on the — day of —, in the year of our Lord 18—, entered into the said one equal undivided moiety [or third or fourth or other part according to the share or interest the plaintiff claims] of the said premises, and ejected, etc. [as in No. 1 to the end.]²

No. 3.

Declaration where the plaintiff claims for a term of years.

[As in No. 1 or No. 2 (as the case may be) to the end of the description of the premises; and then as follows:] which said premises the said A B claims upon the demise of one R S for

¹ Waterman's Adams on Ejectment, 483.

² Waterman's Adams on Ejectment, 484.

a term of years, to wit, for the term of ——— years from the ——— day of ———, last past, [or “in the year of our Lord 18—,”] thence next ensuing, and fully to be complete and ended; and the said A B being so possessed thereof, &c., [*as in No. 1, or No. 2, to and including the words, “the said premises,” and then as follows:*] which the said R S had demised as aforesaid, for the term aforesaid, which is not yet expired, and ejected the said A B therefrom, &c., [*as in No. 1, to the end.*]¹

No. 4.

Declaration by several plaintiffs.

[*Caption as in No. 1.*]

County of to wit: A B, W X and Y Z, by E F, their attorney, complain of C D being in custody, &c. For that whereas, the said A B, W X and Y Z, on the day of in the year of our Lord one thousand eight hundred and , were possessed of a certain dwelling-house and garden, &c. [*Describe the premises as directed in No. 1, No. 2, or No. 3, and then proceed as follows:*] which said premises the said A B, W X and Y Z, claim in fee; [or, “for their joint lives;” or, “for the life of R S,” or otherwise, as the case may be]; and the said A B, W X and Y Z, being so possessed thereof, the said C D afterwards, &c., [*as No. 1, No. 2, or No. 3, to the words, “the possession thereof;” substituting the word “them” for the word “him” throughout.*]

Second Count: And, also, for that whereas the said A B, on, &c. [*As in No. 1, No. 2, or No. 3, to and including the words, “the possession thereof,” and prefixing the word “other” to the description of the premises.*]

Third Case: And, also, for that whereas the said W X, on, &c. [*As directed in the second count; substituting the name of “W X” for that of “A B,” throughout.*]

Fourth Case: And, also, for that whereas the said Y Z, on, &c. [*As directed in the second count; substituting the name of “Y Z” for that of “A B,” and conclude as follows:*] to the damage of the said A B, W X, and Y Z, of dollars, [*any nominal sum the plaintiffs shall think proper to state,*] and therefore, they bring their suit, &c.

E F, Attorney for plaintiffs.²

¹ Waterman's Adams on Ejectment, 484.

² Waterman's Adams on Ejectment, 485.

No. 5.

Declaration in ejectment for dower.

[Caption as in No. 1.]

County of——, to wit: E B, by E F, her attorney, complains of C D, etc., for that, whereas, the said E B, on the ——day of——in the year of our Lord 18—, was possessed of the one undivided third part of, etc. [*Describe the premises as directed in No. 1,*] as her reasonable dower, as widow of A B, deceased, late the husband of the said E B, and the said E B being so possessed thereof, the said C D, afterwards, to wit, on the ——day of——in the year of our Lord 18—, entered into the said undivided third part of the said premises, etc. [*As in No. 1, to the end.*]¹

§ 14. **The Defendant's Pleading.**—The most usual plea on the part of the defendant, under the old practice, was the general issue or the plea of not guilty.² As a general rule, this plea puts in issue every material allegation of the complaint and casts the burden of sustaining each by competent proof upon the plaintiff. In one respect it was a most dangerous plea for the plaintiff, because under it the defendant might conceal the real issue and surprise the plaintiff on the trial with a defense which he was wholly unprepared to meet.

Under the old practice it was very seldom necessary to plead any other pleas but this, and under the modern practice a most liberal tendency exists in its favor, the gist of the action being the wrongful withholding of the premises in question. Evidence of nearly all available legal defenses are admissible under it.³

In ejectment by one claiming under the purchase of an adverse claim to his wife's lands by a husband, the defense that the husband's purchase inured to the wife's benefit is available under a general denial. *Hickman v. Link*, 97 Mo. 482; 10 S. W. Rep. 600 (1889).

Under a general denial, in an action of ejectment, it is competent for defendant to show that the deed from him to plaintiff, on which the latter rests his title, was founded on a consideration illegal by statute, and there-

¹ Waterman's Adams on Ejectment, 486.

² *Bratton v. Mitchell*, 5 Watts (Penn.), 69; *Bernard v. Elder*, 50 Miss.

³ *Gallagher v. McNutt*, 3 S. & R. 336; *Adams on Ejectment*, 302; *Te- (Penn.)* 409; *Zeigler v. Fisher's Heirs*, garden v. Carpenter, 36 Miss. 404; 3 Pa. St. 365; *Lea v. Slatterly*, 7 *Gallagher v. McNutt*, 3 S. & R. (Penn.) Baxt. (Tenn.) 235; *Gosser v. Hicken- 409.*
looper, 81 Pa. St. 281.

fore void, as such evidence tends to show that the title was still in defendant, and that plaintiff was not entitled to possession. *Sparrow v. Rhoades*, 76 Cal. 208; 18 Pac. 245 (1888).

An objection to the validity of a sheriff's deed, upon which plaintiff in ejectment bases his title, that the execution debtor had no other property than the land sold, and no homestead was allotted, may be raised by defendant without pleading such defense. *Mobley v. Griffin*, 104 N. C. 112; 10 S. E. Rep. 142 (1889).

In ejectment, where plaintiff claims land included in an unrecorded deed to defendant, on the ground that the vendor, after selling to defendant, remained in possession, and afterward conveyed to plaintiff without notice of defendant's deed, a reply by defendant, in addition to the general denial, that plaintiff's deed contained a reference to defendant's title sufficient to put him on inquiry, is demurrable, since such fact can be shown under the general denial, and the additional reply is merely argumentative. *Cincinnati, I., St. L. & C. Ry. Co. v. Smith (Ind.)*, 26 N. E. Rep. 1009; Am. Dig. 1891, 1394.

Rev. St. Ill. 1874, p. 445, provides that, in ejectment, "It shall not be necessary for the plaintiff to prove that * * * the plaintiff demanded the possession of the premises, unless the defendant shall deny that * * * demand of possession was made by special plea verified by affidavit." *Held*, that a failure to so plead will be deemed a waiver of proof of demand. *Timmons v. Kidwell (Ill.)*, 27 N. E. Rep. 756; Am. Dig. 1891, 1394.

Proof of adverse possession is admissible under a general denial. *Holmes v. Kring*, 93 Mo. 452; 6 S. W. Rep. 347 (1888).

In an action to recover the possession of real property, the defense of ownership by the defendant or another must be specially pleaded. *Thornburn v. Doscher*, 33 Fed. Rep. 810 (1888).

In ejectment by the vendee against the vendor, the only defenses presented by the answer were a general denial, and a plea of limitation. Defendant sought to prove that he had not been paid the consideration for which he sold the land: *Held*, that it was properly refused. *Colvin v. Republican Valley Land Ass'n*, 23 Neb. 75; 36 N. W. Rep. 361.

§ 15. **Under the Modern Practice.**—Under the modern practice it is sufficient as a general rule to deny the plaintiff's title, and under such denial evidence of any matters having a tendency to show that the plaintiff was not vested with the title or right of possession at the time of the commencement of the action is admissible.¹ But this plea is an admission of the possession in the defendant, and so a denial of the possession in the defendant, and of the unlawful withholding of the premises is an admission of the plaintiff's title. If the defendant desires to put upon the plaintiff the fullest burden of proof he must specifically deny each and every material allegation of the complaint.²

¹ *Wicks v. Smith*, 18 Kan. 508.

v. Daugney, 33 Calif. 505; *Wade v.*

² *Ford v. Sampson*, 17 How. p. (N. Doyle, 17 Fla. 522, Y.) 447; 30 Barb. (N. Y.) 183; *Sharp*

The plea of general issue admits the defendant to be in possession of all lands not disclaimed specially. *Coffin v. Freeman*, 82 Me. 577; 20 Atl. Rep. 238.

In ejectment, a general denial in the answer of plaintiff's allegations of title and right to possession is equivalent to a confession of ouster. *Gilchrist v. Middleton*, 107 N. C. 663; 12 S. E. Rep. 85.

Under Code Miss. § 2483, a plea of not guilty admits defendant's possession. Defendant interposed such a plea, and also the special plea denying the fact of possession allowed by section 2486, which provides that "in such case the title of the plaintiff shall be admitted, and the only question on the trial shall be in relation to the fact of possession." *Held*, that the court should have directed one or the other of the pleas to be stricken from the files, even though no action was taken by plaintiff, as no issue could be presented while both pleas remained. *Powell v. Watson*, 66 Miss. 176; 5 So. Rep. 513.

§ 16. **Disclaimer.**—If the defendant has, in fact, no interest in the premises, he may set up in his answer a disclaimer. This plea is usually provided for in the legislative enactments of the different States, and may usually be set up in connection with other defenses, though in some cases it has been held as inconsistent with the plea of not guilty of wrongfully withholding the premises.¹

In a writ of entry, the tenant disclaimed title to the demanded premises, and the demandant filed a replication charging that the tenant had, within twenty years last past, claimed title to the demanded premises, and received the rents and profits of the same. The demandant offered evidence that the tenant had claimed to be the sole and exclusive owner of the right to take fish in a stream running through the demanded premises, and for several years had sold such right: *Held*, that the tenant's claim was merely of an easement in the demanded premises and its enjoyment; and that the demandant could not elect to be disseized and recover compensation for such use. *Cole v. Eastham*, 124 Mass. 307 (1876).

In an action for ejectment, defendant filed a "disclaimer" in the following words: "And the said defendant further says that he does not claim title to the said tract of land sued for in this action; nor does the said defendant claim the possession, or the right to possession of the said land, except the right to enter upon said land, and to quarry and remove, free of charge for royalty, all the limestone that may be required by the said defendant for furnace and agricultural purposes (in connection with the aforesaid Mt. Airy tract of land) from the said plaintiff's land on the opposite side of the river from the aforesaid Mt. Airy tract, and which are the same lands sued for in this action, as was granted and allowed unto the said defendant by the said plaintiff by and under their certain written agreement under date of —; and this the said defendant is ready to verify." *Held*, that this is not technically a disclaimer, but is in the nature of a special plea, and ought to have been rejected. *Reynolds v. Cook*, 83 Va. 26; 3 S. E. Rep. 710 (1887).

¹ *King v. Kent*, 29 Ala. 542; *Bernstein v. Humes*, 60 Ala. 498.

§ 17. **A Plea Puis Darrien Continuance.**—The complaint in ejectment must allege the possession or seizin of the premises or some estate therein by the plaintiff, on some day to be stated, the subsequent entry of the defendant thereon, and his withholding the same from the plaintiff. A plea of the general denial puts in issue the plaintiff's title at the date alleged, or at least his title at the commencement of the action. Any title acquired subsequent to the filing of the plea and issue joined upon, must be set up by a supplemental answer in the nature of a plea *puis darrien continuance* filed by permission of the court.¹

In ejectment, a plea *puis darrien continuance*, which alleges that before plaintiff's right accrued defendant surrendered possession under a mortgage given by him, and that he is holding merely as the mortgagee's tenant, and which does not allege that plaintiff's right was acquired by purchase or otherwise of defendant's equity of redemption, is demurrable, since it does not show that plaintiff has not acquired a title paramount to that of the mortgagee. *Patrick v. Hutcheson* (Ala.), 8 So. Rep. 821; Am. Dig. 1891, 1394.

When a defendant mortgagor was in possession and whose interest in the premises had been sold upon an execution against him, it was held that he might protect his possession in an action of ejectment against him by the purchaser, by a lease for years from his mortgagee, the mortgage being prior to the levy. And when this title to continued possession occurred pending the suit, the defendant may plead it *puis darrien continuance*. *Simmons v. Brown*, 7 R. I. 427.

§ 18. **Pleading the Statute of Limitations.**—The general rule is, that the statute must be pleaded, and the reason of the rule is, that all defenses of confession and avoidance must be affirmatively pleaded. In their very nature they can not be aptly proved under a plea which simply denies the allegations of the pleading answered. This rule has no application where the cause of action alleged to be barred, is not set out in the declaration or former pleading. If a declaration be upon the covenants in a deed, and their breach, under pleas denying the making of the covenants or denying the breach thereof, it would not be pertinent to the issue to prove that the breach was barred by the statute. The statute of limitations being a de-

¹ *Hardy v. Hardy*, 68 U. S. (1 Wall.) 371 (1863); *Yount v. Howell*, 14 Cal. 463.

fense in the nature of a confession and avoidance, must necessarily be specially pleaded.¹

In ejectment, where the plaintiff relies upon a sale made under a mortgage, after the debt was barred by the statute of limitations, the defendant may avail himself of the statute as against the title, under the plea of the general issue, or plea of not guilty. *Emory v. Keigham*, 88 Ill. 482 (1878).

A plea "that at the time of the bringing of this suit, and long prior thereto this defendant was, and still is, in the open, notorious, continuous and exclusive possession of the said premises as the sole owner thereof, and claiming and holding adversely to the complainants and the whole world," is bad, in that it consists of conclusions of law. *McCloskey v. Barr*, 38 Fed. Rep. 165 (1889).

The petition alleged title and right to possession in plaintiff of a certain tract of land; that defendant had unlawfully entered and taken possession of certain parcels thereof. The answer denied plaintiff's ownership and right to possession; alleged that said parcels were parts of a tract owned by defendant; and that defendant had had adverse possession for the statutory period, claiming and using it to a well-marked boundary: *Held*, that the answer sufficiently pleaded adverse possession of the parcels in dispute, and that a general demurrer thereto was properly overruled. *Young v. Cox* (Ky.), 14 S. W. Rep. 348; Am. Dig. 1891, 52.

§ 19. **The Rule Under Statutes.**—In many States the necessity of pleading the statute of limitations has been obviated by statutory enactments. As an illustration we quote the statute of Illinois:

§ 19. The defendant may demur to the declaration, as in personal actions, or he shall plead the general issue, which shall be, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration; and the filing of such plea or demurrer shall be deemed an appearance in the cause, and upon such plea the defendant may give in evidence any matter that may tend to defeat the plaintiff's action, except as hereinafter provided.

§ 21. The plea of not guilty shall not put in issue the possession of the premises by the defendant, or that he claims title or interest in the premises.

§ 22. It shall not be necessary for the plaintiff to prove that the defendant was in possession of the premises, or claims title or interest therein at the time of bringing the suit, or that the plaintiff demanded the possession of the premises, unless the defendant shall deny that he was in such possession, or claims title or interest therein, or that demand of possession was made, by special plea, verified by affidavit.²

¹ *Owen v. De Beauvoir*, 5 Exch. 166. ² R. S. Ill., Chap. 45, §§ 19, 21, 22; 1 Starr & Cur. 984.

Under this statute the Supreme Court of Illinois holds that special pleas putting in issue some or all of the matters specified in the statute are the only special pleas required in an action of ejectment. All other defenses may be made under the plea of not guilty.¹ Similar provisions exist in nearly all of the States.

§ 20. **The Statute of Limitations in Real Actions.**—It is a well settled rule of law, applicable to real actions, that it is not necessary, as in personal actions, to plead a statute of limitations, and, therefore, if it appear, on the face of the record, that the action is not brought within the time limited by law, the tenant may avail himself of it by general demurrer.²

§ 21. **The Statute Distinguished.**—The bar of the statute is wholly unlike infancy or coverture and the like, where the person has, under disability, acted and seeks to avoid the act. In that case, the person who has acted under disability can alone plead it or avoid the act. Where a minor sells and conveys real estate, he alone can annul such conveyance, but if he, on arriving at age, sells and conveys to another, this will avoid the sale, and the grantee may show that the prior sale had been annulled. In such a case the second grantee does not claim to set up the disability for the minor, but simply to show that his grantor had exercised the right, and that he had acquired rights in the property.³

Adverse possession under a claim of right, if uninterrupted, open, visible and notorious, may be set up in such an action, not only as a defense to the cause of action set forth in the declaration, but to show the nullity of any conveyance executed by any one out of possession. *Hogan v. Kurtz*, 94 U. S. (4 Otto) 319 (1876); *Bradstreet v. Huntington*, 5 Pet. 438; *Hawk v. Genseman*, 6 G. & R. 21; *Ang. Lim.* 6th Ed., § 386; 2 *Greenl. Ev.*, 12th Ed., Sec. 430.

§ 22. **Grantee of Minor Heirs and Persons Under Disability.**—Where persons who have inherited title to land are in their minority when their title accrues, and afterward convey the land to a third person, such grantee in asserting his title in ejectment, or against a person defending under the statute

¹ *Stubblefield v. Borden*, 92 Ill. 279 122 (1839); *Holmes v. Holmes*, 2 Pick. (1879); *Warren v. President, etc.*, 15 (Mass.) 23.

Ill. 236; *Walker v. Armour*, 22 Ill. 658. ³ *Walker, J.*, in *Huls v. Buntin*, 47 Ill. 396 (1868).

² *Overseers, etc., v. Sears*, 39 Mass.

of limitations, may show the disability of his grantor, at any time within the statutory period, and thus prevent the bar.

An infant, feme covert, or other person within the saving of the statute, may show the disability at any time within the statutory period, and thus prevent the bar, and the grantee must be held to occupy the same position. The person claiming the bar only acquires it as against persons who are bound to assert their rights within the limited period. He can only insist that the action or entry is tolled by the neglect of the owner, not under disability to assert his rights within the statutory period. As against persons under disability, he has not acquired any right, and where he shows that he has performed the statutory requirement which confers the right, his apparent bar is overcome when it is shown that the person against whom it is asserted is not embraced within, but is excepted from the provisions of the statute.

The statute does not begin to run until the disability is removed, and hence no bar can be acquired against a person under disability. The statutory period must elapse after the disability ceases, before there can be a bar under the statute.¹

§ 23. **Pleading a Tax Title.**—The rules which govern the mode of pleading a title derived under a tax sale, will, of course, depend upon the form of action, the character of the defense, or nature of the controversy in which the question arises. In real actions and actions of ejectment, brought by the party who claims the land under such a title, and in trespass *quare clausum fregit*, and actions upon the case in tort, instituted by him for an injury to the possession or inheritance, the general allegation of title will be sufficient, as in ordinary cases.²

§ 24. **Precedents of the Defendant's Pleas.**

No. 1.

The plea of not guilty.

[*Title, etc.*]

And the defendant C— D—, by his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of unlawfully withholding the lands and tenements in the said declaration mentioned, or any part thereof in man-

¹ Walker, J., in *Huls v. Buntin*, 47 Ill. 396 (1868). ² Blackwell on Tax Titles, 584.

ner and form, as the plaintiff has in said declaration thereof complained against him, and of this he puts himself upon the country.¹

The foregoing precedent is a common law form but may be adopted to the modern practice by simply changing the form of the inducement, thus: And further answering the said complaint this defendant says that he is not guilty of unlawfully withholding the lands and tenements in the said complaint mentioned, or any part thereof in manner and form as the plaintiff has in his said complaint alleged.

No. 2.

Plea denying possession.

[*Title, etc.*]

And for a further plea in this behalf the defendant says that the plaintiff ought not to maintain his aforesaid action against him, the said defendant, because he says he was not at the time of the commencement of the said action nor has he at any time since then been in the actual or constructive possession of the said premises in the said declaration mentioned, or any part thereof in manner and form as the said plaintiff in his said declaration thereof has complained against him, and of this he puts himself upon the country.²

No. 3

A disclaimer.

[*Title, etc.*]

And for further plea in this behalf the defendant says that the plaintiff ought not to have his said action against him, the said defendant, because, he says he disclaims all right, title and claim to any estate of inheritance or of freehold in the premises described in the plaintiff's declaration, and of this he puts himself upon the country.³

No. 4.

Another form.

And for a further plea in this behalf the defendant says that the plaintiff ought not to maintain his aforesaid action against him, the said defendant, because, he says, that he fully and absolutely disclaims all manner of right, title and interest

¹ Adams on Ejectment, 488; Yates' Pleading, 507; Puterbaugh's Common Law, 614.

² See Yates' Pleading, 507.

³ Yates' Pleading, 507.

whatsoever, in or to the said lands and tenements in the said declaration mentioned or any part thereof, at the time of the commencement of this suit, or at any other time or times since then, and of this he puts himself upon the country, etc.

See Puterbaugh's Chancery, 184. These forms may be made applicable to the code practice by slight changes as indicated in precedent No. 1.

No. 5.

A plea of puis darrien continuance.

[*Title, etc.*]

And now at this day, to wit, on, etc., at, etc., until which day the plea aforesaid was last continued before the said court, now here comes the defendant by E F, his counsel, and says that the said plaintiff ought not further to have or maintain his action aforesaid thereof against him, because he says that after the last continuance of this cause, to wit, *the first day of the preceding term*, from which day this cause was last continued, and before this day, to wit, on, etc., at, etc. [*and then set out the matter relied on and conclude as in other pleas.*]¹

§ 25. Pleadings—Statutory Provisions.

(1) ALABAMA.

SECTION 2698. *Effect of pleading general issue.* The general issue in an action in the nature of an action of ejectment is "not guilty," and under it the defendant may give in evidence the same matters which may be given in evidence under such plea in an action of ejectment; the general issue is an admission that the defendant is in possession of the premises sued for.

King v. Kent, 29 Ala. 542; Bernstein v. Humés, 60 Ala. 582; Crosby v. Pridgen, 76 Ala. 385; Clarke v. Clarke, 51 Ala. 498; Slaughter v. Swift, 67 Ala. 494.

Sec. 2699. *Disclaimer of possession.* The defendant may, in an action of ejectment, or an action in the nature of an action of ejectment, disclaim possession of the premises sued for, in whole or in part, and, upon such disclaimer, the plaintiff may, if he so elects, take issue, and, if the issue be found for him, he is entitled to judgment as if the defendant had, in an action of ejectment, entered into the consent rule, confessing possession as well as lease, entry and ouster, or, in an action in

¹ Yates' Pleading, 291; 3 Chitty's Pleading, 1237.

the nature of an action of ejectment, had pleaded "not guilty," admitting possession.

1 Code of Alabama, 1886, Ch. 6; *Clarke v. Clarke*, 51 Ala. 498; *Kirkland v. Trott*, 66 Ala. 417; *Alexander v. Wheeler*, 69 Ala. 332; *Callan v. McDaniel*, 72 Ala. 96; *McQueen v. Lampley*, 74 Ala. 408; *Morris v. Beebe*, 54 Ala. 300.

(2) ARKANSAS.

SECTION 2632. *Pleadings and evidence—Evidence of title to be exhibited.* In all actions for the recovery of lands, except in actions of forcible entry and unlawful detainer, the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same as far as they can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy, and the defendant in his answer shall plead in the same manner as required from the plaintiff.

Digest of the Statutes of Arkansas, Ch. 55, page 590.

(3) COLORADO.

SECTION 267. *Complaint requisite—Mines—Lands of U. S.—Estate—Damages.* The plaintiff in his complaint shall set forth the nature and extent of his estate in the property, and state whether it be in fee, for life, or for the life of another, or for a term of years, and specifying such life or the duration of such term; or, if such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the State of Colorado or otherwise, the complaint shall contain a brief statement of such possessory claim, and whether the right claimed is by pre-emption or purchase, or by right of actual prior possession on the public domain of the United States.

If the plaintiff claims any undivided interest in the premises, as tenant in common, or otherwise, he shall state particularly the interest he claims. The plaintiff shall also state that he is entitled to the possession of the premises, and that the defendant wrongfully ousted the plaintiff, or wrongfully withholds the premises from him, or both, as the facts may be, and state the damages claimed for the ouster, or detention, or both, which damages shall be recovered and assessed by the court or jury in the same action.

Sec. 268. *Answer shall deny or disclaim; shall set out defendant's claim.* The answer to a complaint filed under this chapter shall either specifically or generally deny the material allegations of the complaint, or may disclaim any interests in, or possession of the property claimed, or any part thereof. The answer may also state, generally, as in the complaint, the character of the estate in the premises, or any part thereof, which the defendant claims, or any right of possession or occupancy he claims.

Civil Code Colo. 1887, 173.

(4) DAKOTA.

SECTION 5451. - *Complaint must contain description of property.* In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

Compiled Laws Dak. 1887, Ch. 29, § 51, 54.

(5) FLORIDA.

In all actions of ejectment the declaration may be in the following form:

In the Circuit Court of Florida, circuit, term A. D. 1870, county, to wit, A B, by his attorney, complains of C D, who has been summoned to answer him in an action of ejectment, for that whereas the defendant is in possession of a certain tract or parcel of land situate, lying and being in said county, known and described as follows, to wit (here describe the land): containing about acres, to which said plaintiff claims title; and the defendant has received the profits of said land since the day of A. D. , of the yearly value of dollars, and refuses to deliver the possession of said land to the said plaintiff, or to pay him the profits thereof.

The statute provides that the plea of not guilty shall put in issue the title to the land in controversy.

Laws of Florida, 1859, Ch. 999.

(6) GEORGIA.

SECTION 3389. *Form for the recovery of real estate.* The form of a declaration for the recovery of real estate and mesne profits may be as follows, to wit:

Georgia,
 ——— county.

To the Superior Court of said county.

The petition of A B sheweth that C D, of said county, is in possession of a certain tract of land in said county (here describe the land), to which your petitioner claims title; that the said C D has received the profits of said land since the ——— day of ———, 18—, of the yearly value of ——— dollars, and refuses to deliver said land to your petitioner, or to pay him the profits thereof; wherefore, your petitioner prays process may issue requiring the said C D to be and appear at the next Superior Court to be held in and for said county, to answer your petitioner's complaint.

Code of Georgia, 1882, p. 858.

(7) INDIANA.

SECTION 1054. *Contents of complaint.* The plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession.

R. S. Ind., 1881, Art. 38, Ejectment.

The complaint must designate the premises with reasonable certainty, stating the county and state where the land lies. *Leary v. Langsdale*, 35 Ind. 74; *DeArmond v. Armstrong*, 37 Id. 35; *Inge v. Garrett*, 38 Id. 96; *Jolly v. Ghering*, 40 Id. 139.

Sec. 1055. *Answer in denial—Effect.* The answer of the defendant may contain a denial of each material statement or allegation in the complaint; under which denial, the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable.

R. S. Ind. 1881, Art. 38, Ejectment.

All defenses are admissible under the general denial; but to enforce a contract for conveyance requires an affirmative paragraph of answer. *Emily v. Harding*, 53 Ind. 102; *Graham v. Graham*, 55 Id. 23; *State v. Meyer*, 63 Id. 33.

In ejectment, the sustaining of a demurrer to a specific paragraph of answer is harmless, if the general denial be pleaded. *Berlin v. Oglesbee*, 65 Ind. 308.

(8) IOWA.

SECTION 3250. *Form of petition.* The petition may state generally, that the plaintiff is entitled to the possession of the

premises, particularly describing them; also the quantity of his estate and the extent of his interests therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the property; but if he claims other damages than rents and profits, he shall state the facts constituting the cause thereof.

To require a full statement of all the facts constituting the right to the immediate possession, it was thought would involve much labor, and was not in fact necessary to warn the defendant, who was in most cases practically apprised by the record of the true grounds of the plaintiff's claim. This is but the current practice now, but this section makes clear what is now in some doubt. Report on Civil Code, p. 334.

Under this section the general rules of pleading are suspended, and a general averment of the right claimed, without a statement of the facts upon which it is intended to sustain such right, is sufficient. *Phillipp v. Blair*, 38 Iowa, 649 (1874).

It has been held to be sufficient for the plaintiff to state his interest. He need not state the evidence upon which he expects to prove it. *Larum v. Wilmer*, 35 Iowa, 244 (1872).

Plaintiff may recover for the use and occupation as well as for the title and possession. *Dunn v. Starkweather*, 6 Iowa, 466 (1858); 2 McClain's Statutes, 858.

Sec. 3251. *Abstract of title to be attached.* The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page and book where the same appears of record. If such title, or any portion thereof, is not in writing or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title shall be introduced on the trial unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific and may be canceled as other proceedings.

Sec. 3252. *Form of answer.* The answer of the defendant and of each, if more than one, must set forth what part of the land he claims, and what interest he claims therein, generally, and without the facts constituting the right, and if as mere tenant, the name and residence of his landlord, and need state nothing more than this.

2 McClain's Statutes, 857.

(9) KANSAS.

SECTION 595. *Petition—Action for recovery of real property.*
 In an action for the recovery of real property, it shall be sufficient if the plaintiff state, in his petition, that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and twenty-seven, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.

Sec. 596. *Answer.* It shall be sufficient, in such action, if the defendant, in his answer, deny, generally, the title alleged in the petition, or that he withholds the possession, as the case may be; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted.

General Statutes Kan. 1889, Art. 24, p. 532.

(10) KENTUCKY.

Pleadings.

Franklin Circuit Court.

JOHN SMITH, <i>plaintiff,</i>	}	Petition.
<i>agt.</i>		
RICHARD JONES, <i>defendant.</i>		

The plaintiff, John Smith, states that he is the owner, and entitled to the possession of a tract of land in Franklin county, containing seventy-five acres, and bounded on the north and west by the Kentucky river, on the south by the land of John Craig, and on the east by the land of Thomas Page; that the defendant, Richard Jones, now holds possession of the land without right, and for two years past has unlawfully kept the plaintiff out of possession.

Wherefore, he prays judgment for the recovery of the land, and two hundred dollars damages, for being kept out of possession, and for other proper relief.

JOHN SMITH.

Franklin Circuit Court.

JOHN SMITH, <i>plaintiff,</i>	}	Answer.
<i>agt.</i>		
RICHARD JONES, <i>defendant.</i>		

The defendant, Richard Jones, admits that the plaintiff is the legal owner of the land mentioned in his petition, but on

the first day of September, 1848, the plaintiff, by a written contract, filed herewith, agreed to sell the land to the defendant at the price of one thousand dollars, payable twelve months after said date, and placed the defendant in possession of the land as purchaser, and the defendant has offered, and now offers, to pay to the plaintiff the full amount due to him for the price of the same.

Wherefore, he prays judgment, that the plaintiff convey to him the land, and that his possession be quieted, and for other proper relief.

RICHARD JONES.

Franklin Circuit Court.

JOHN SMITH, *plaintiff*,
agt. }
 RICHARD JONES, *defendant.* } Reply.

The plaintiff, John Smith, admits that he made the contract in writing mentioned in the defendant's answer, but afterward in the month of September, 1848, the plaintiff and defendant, by a verbal agreement, rescinded said contract, and defendant then agreed to restore to the plaintiff the possession of the land, on the first day of November, 1848, which the defendant has failed to do.

JOHN SMITH.

Ky. Code, 1854, § 118, 119, 152.

(11) MAINE.

SECTION 2. *Declaration.* The demandant shall declare on his own seizin within twenty years then last past, without naming any particular day or averring a taking of the profits, and shall allege a disseizin by the tenant.

Sec. 3. *Demandant shall set forth the estate he claims in the premises.* He shall set forth the estate he claims in the premises, whether in fee simple, fee tail, for life or for years; and if for life, then whether for his own life or that of another; but he need not state in the writ the origin of his title, or the deduction of it to himself; but, on application of the tenant, the court may direct the demandant to file an informal statement of his title and its origin.

(12) MASSACHUSETTS.

SECTION 2. *Form of declaration.* The demandant shall declare on his own seizin within twenty years then last past,

without specifying any particular day, and shall allege a disseizin by the tenant, but need not aver a taking of the profits; and he shall then set forth the estate that he claims in the premises, whether it is in fee simple, fee tail, or for life, and if the latter, whether it is for his own life or for the life of another, but he shall not be required to set forth the original gift, devise or other conveyance or title by which he claims the estate.

Pub. Stats. Mass. 1882, p. 1018.

(13) MICHIGAN.

SECTION 7. *Contents of declaration.* It shall be sufficient for the plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title or right accrued, he was possessed of the premises in question, describing them as hereinafter provided, and being so possessed thereof that the defendant afterward, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state.

Sec. 8. *Premises claimed, how described.* In such declaration the premises claimed shall be described with such convenient certainty by setting forth the section or part of a section, township and range, or the number of the lot or otherwise, that from such description possession of the premises claimed may be delivered.

Sec. 9. *Undivided shares.* If such plaintiff claim an undivided share or interest in any premises, he shall state the same particularly in such declaration.

Sec. 10. *Estate of plaintiff.* If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower as the widow of her husband, naming him. In every other case the plaintiff shall state whether he claims in fee or whether he claims for his own life, or for the life of another, or for a term of years or otherwise, specifying such lives or the duration of such term.

Sec. 11. *Several counts and plaintiffs.* In any case other than where the action is brought for the recovery of dower, the declaration may contain several counts, and several parties

may be named as plaintiffs, jointly in one count and separately in others.

R. S. Mich. 1882, Ch. 269.

(14) MISSISSIPPI.

SECTION 2479. *Declaration.* The consent rule, and all fictions heretofore used in actions of ejectment, are hereby abolished, and the action of ejectment shall be commenced by filing a declaration in the name of the person claiming the premises in question, as plaintiff, against the tenant or possessor thereof as defendant; the declaration shall describe the premises with such certainty as will distinctly apprise the defendant of their description and situation, and so that from such description, possession may be delivered; and if the plaintiff claims only an undivided interest therein, it shall state such interest, and the declaration may contain several counts. If the plaintiff shall claim more than he is entitled to, he may, nevertheless, recover so much as he shall prove title to.

Sec. 2480. *Summons.* On filing the declaration, a summons shall issue against the defendant, which shall be issued, executed and returned, in the same manner prescribed for the issuance, execution and return of a summons in personal actions.

Sec. 2481. *Plea and defense.* The defendants named in the summons, or either of them, shall be allowed to plead to and defend the action, either jointly or separately; the plea shall be "not guilty," which shall be filed in the same time required in personal actions; and under said plea, the defendant may give in evidence any lawful defense to the action, not inconsistent with the other provisions of this chapter. The defendants, or either of them, may defend for a part only of the premises in question; and in such case, the part shall be described in the plea with the same certainty required in the declaration.

Rev. Code Miss. 1880, Ch. 68, p. 671.

Sec. 2487. *Forms of proceedings.* Declarations, writs and pleas, in the form, or to the effects of the precedents appended hereto, shall be good and sufficient for all purposes, in any proceedings under this chapter.

1. *Form of declaration.*

The State of Mississippi, } In the Circuit Court,
County of _____ } _____ Term, 188--

A B, the plaintiff in this action, by his attorney, demands of C D, the defendant therein, the possession of an equal undivided one fourth part of a tract of land, with the appurtenances, situate in said county, containing _____ acres, more or less, and being (here describe the same), and the plaintiff says that his right to the possession of the same accrued on the _____ day of _____ A. D. —, and that the defendant wrongfully deprives him of the possession thereof, to his damage, one hundred dollars.

E F, Attorney for plaintiff.

If mesne profits are demanded, add to the above form the following: And the said plaintiff also demands of the defendant, the sum of _____ dollars, for the use and occupation of the said land by the defendant, from the aforesaid day to the commencement of this suit, being at the rate of _____ dollars a year.

2. *Form of summons.*

State of Mississippi.

To the Sheriff of _____ County, Greeting:

We command you to summon C D to appear before the Circuit Court of the County of _____, to be held at the court house thereof, on the _____ Monday of _____ next, to answer to the complaint of A B, who demands of him the possession of (describe the land as in the declaration), and in default of his appearing and defending this action, judgment will be entered against him, and he will be turned out of possession of said land, and have you then and there this writ.

_____, Clerk.

3. *Form of plea by defendant defending for whole.*

C D }
ads. } Circuit Court of _____ County.
A B }

And the said C D, by his attorney, appears and defends this action, and says he is not guilty of the injury whereof the said A B hath complained in his declaration, nor of any part thereof, and of this he puts himself upon the country.

G H, Attorney of defendant.

4. *Form of plea where tenant defends for part.*

After stating the court and parties, say :

And the said C D, by his attorney, appears and defends this action, as to a part of the premises claimed by plaintiff in his declaration, to wit: (describe the part defended for) and as to the part so defended for, he says he is not guilty of the injury whereof the said A B hath complained in his declaration, and of this he puts himself upon the country.

5. *Form of plea by landlord, defending separately.*

State the court and parties, and then say :

And R S, who is admitted to defend this action as landlord, by his attorney, appears and defends this action, etc. (as in form number three or four, according to circumstances.)

6. *Plea by any other than the landlord.*

State the court and parties, and then say :

And N O, who is admitted as a proper person to defend this action by his attorney, appears and defends this action, etc. (as in number three or four according to circumstances.)

7. *Plea by landlord and tenant, defending.*

State the court and parties, and then say :

And the said C D, together with R S, who is admitted to defend this action as landlord, by their attorney, appear and defend the action, etc. (as in number three or four, according to circumstances.)

8. *Plea by other than landlord, defending with tenant.*

State the court and the parties, and then say :

And the said C D, together with N O, who is admitted as a proper person to defend this action, by their attorney, appear and defend the action (as in number three or four, according to circumstances).

Revised Code Miss. 1880, Ch. 68.

(15) MISSOURI.

SECTION 4631. *Petition—Necessary averments.* It shall be sufficient for the plaintiff to aver in the petition that on some day therein specified, he was entitled to the possession of the premises, describing them, and being so entitled to the posses-

sion thereof, that the defendant, afterward, on some day to be stated, entered into such premises, and unlawfully withholds from the plaintiff the possession thereof, to his damage, in any sum he may claim. (R. S. 1879, S. 2245—f.)

Sec. 4632. *Pleadings and proceedings.* All pleadings and proceedings in this action shall be conducted as in other civil actions except where it is herein otherwise prescribed. (R. S. 1879, S. 2246—g.)

R. S. Mo. 1889, Ch. 59.

(16) NEBRASKA.

SECTION 626. *Recovery—Petition—Allegations.* In an action for the recovery of real property, it shall be sufficient, if the plaintiff states in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and thirty-three, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.

Sec. 627. *Answer.* It shall be sufficient in such action if the defendant in his answer deny generally, the title alleged in the petition, or that he withholds possession, as the case may be; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted. Where he does not defend for the whole premises, the answer shall describe the particular part for which defense is made.

Compiled Statutes, Neb., Code Civil Procedure, p. 822.

(17) NEW JERSEY.

SECTION 10. *Declaration, what to contain.* The declaration shall describe the premises claimed with the same certainty as the summons, and shall state the time when the plaintiff's right to the possession thereof accrued, and may contain several counts; and shall be according to one of the forms of declarations contained in said schedule, as the circumstances of the case may require, or to the like effect.

Sec. 12. *Form of plea.* The plea shall be according to one of the forms of pleas contained in the schedule, as the circumstances of the case may require, or to the like effect, and, under such plea, the defendant may give in evidence any lawful de-

fense to the action, not inconsistent with the other provisions of this act.

Sec. 13. *What plea admits.* The plea of the defendant shall, for the purpose of that action, be an admission that he was in possession of the premises for which he defends, or that he claimed title thereto, at the time of commencing the action.

R. S. N. J. 1877, Title Ejectment.

SCHEDULE OF PRECEDENTS.

No. 1. *Form of summons in ejectment.*

New Jersey, ss. The State of New Jersey, to the Sheriff of the county of——, Greeting:

We command you to summon C D to appear before our Supreme Court at Trenton, on the——day of——next, to answer to the complaint of [L. S.] A B, who demands of him the possession of the equal, undivided one-fourth part of a tract of land, with the appurtenances, situated in the township of——, in the county of——, containing——acres, more or less, bounded on the north by lands of E F, and on the south by lands of G H, on the east by lands of I K, and on the west by lands of L M.

And in default of his appearing and defending this action judgment will be entered against him, and he will be turned out of the possession of said land.

And have you then and there this writ.

Witness:——, Esquire, Chief Justice, at Trenton, the——day of——eighteen hundred and——.
——, Attorney. ———, Clerk.

No. 2. *Form of declaration against the defendant named in the summons.*

New Jersey Supreme Court } ss. (Here insert the date of the summons.)
of the——County, } A B, the plaintiff in this action, by——, his attorney, demands of C D, the defendant therein, the possession of the equal, undivided one-fourth part of a tract of land, with the appurtenances, situated in the township of——, in said county, containing——acres, more or less, bounded on the north by the lands of E F, on the south by the lands of G H, on the east by the lands of I K, on the west by the lands of L M.

And the plaintiff says that his right to the possession of the same accrued on the——day of——eighteen hundred and——, and that the defendant wrongfully deprives him of the possession thereof, to his damage——dollars.

——, Attorney of plaintiff.

No. 3. *Form of declaration where the landlord or other person is admitted to defend.*

(State the title of the court and the time of commencing the action, as in number two, and then proceed as follows:)

—— County, ss. A B, the plaintiff in this action, by——, his attorney, demands of C D and R S, the defendants therein (the summons having been issued against the said C D, and the said R S having been admitted to defend), (and then proceed as in form number two, to the end.)

No. 4. *Form of plea by the tenant in possession, where he defends for the whole of the premises claimed.*

C D. }
Adsm. } In Ejectment, Plea.
A B. }

New Jersey Supreme Court.

And the said C D by——, his attorney, appears and defends this action, and says he is not guilty of the injury whereof the said A B hath complained in his declaration, nor of any part thereof, and of this he puts himself upon the country.

——, Attorney of defendant.

No. 5. *Form of plea if the tenant in possession defends only for a part of the premises.*

(After stating the court and action, say:)

And the said C D by——, his attorney, appears and defends this action as to a part of the premises claimed by the plaintiff in his declaration, to wit: ——acres thereof, situate and described as follows, to wit: and as to the part so defended for, he says that he is not guilty of the injury whereof the said A B hath complained in his declaration, and of this he puts himself upon the country.

——, Attorney for defendant.

No. 6. *Form of plea by the landlord when defending separately.*

(State the court and action as in form number four, and then say:)

And R S, who is admitted to defend this action as landlord, by —— his attorney, appears and defends the action, and so forth (as form number four or five, according to the circumstances of the case).

No. 7. *Form of plea by any other person than the landlord admitted to defend, and defending separately.*

(State the court and action, as in number four, and then say:)

And N O, who is admitted as a proper person to defend this action, by —— his attorney, appears and defends the action, and so forth (as in form number four or five, according to the circumstances of the case).

No. 8. *Form of plea by the landlord when defending jointly with the tenant in possession.*

(State the court and action, as in form number four, and then say:)

And the said C D together with R S, who is admitted to defend this action as landlord, by —— their attorney, appear and defend the action, etc. (as in form number four or five, according to the circumstances of the case.)

No. 9. *Form of plea where any person other than the landlord is admitted to defend and defends jointly with the tenant in possession.*

(If any other person than the landlord be admitted to defend, and defend jointly with the tenant in possession, then after stating the court and action, as in form number four, say:)

And the said C D together with N O, who is admitted as a proper person to defend this action, by —— their attorney, appear and defend the action,

etc. (as in form number four or five, according to the circumstances of the case.)

R. S. N. J. 1877, Title Ejectment, p. 326.

(18) ILLINOIS.

SECTION 11. *Plaintiff's averments.* It shall be sufficient for the plaintiff to aver in his declaration, that (on some day therein to be specified, and which shall be after his title accrued) he was possessed of the premises in question (describing them as hereinafter provided), and, being so possessed thereof, that the defendant afterward (on some day to be stated) entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage any nominal sum the plaintiff shall think proper to state. (R. S. 1845, p. 205, § 7.)

Sec. 12. *Description of premises.* The premises so claimed shall be described in such declaration with convenient certainty, so that, from such description, possession of the premises claimed may be delivered. If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration; but the plaintiff, in any case, may recover such part, share or interest in the premises as he shall appear on the trial to be entitled to. (R. S. 1845, p. 205, § 7; *Almond et al. v. Bonnell*, 76 Ill. 536.)

Sec. 13. *Kind of estate.* In every case the plaintiff shall state whether he claims in fee, or whether he claims for his own life or the life of another, or for a term of years, specifying such life or the duration of such term.

Sec. 14. *Counts—Parties.* The declaration may contain several counts, and several parties may be named as plaintiffs, jointly in one count and separately in others. (R. S. 1845, p. 205, § 9.)

DEFENDANT'S PLEAS.

Sec. 19. The defendant may demur to the declaration, as in personal actions, or he shall plead the general issue, which shall be, that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration; and the filing of such plea or demurrer shall be deemed an appearance in the cause, and upon such plea the defendant may give, in evidence, any matter that may tend to defeat the plaintiff's action, except as hereinafter provided.

Sec. 21. The plea of not guilty shall not put in issue the possession of the premises by the defendant, or that he claims title or interest in the premises.

Sec. 22. It shall not be necessary for the plaintiff to prove that the defendant was in possession of the premises, or claims title or interest therein at the time of bringing the suit, or that the plaintiff demanded the possession of the premises, unless the defendant shall deny that he was in such possession, or claims title or interest therein, or that demand of possession was made by special plea, verified by affidavit.

R. S. Ill. 1889, Ch. 45, p. 596.

(19) OHIO.

SECTION 5781. *Petition in action for land.* In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same as required by section *five thousand and ninety-five*, and that the defendant unlawfully keeps him out of the possession, and it shall not be necessary to state how the plaintiff's estate or ownership is derived.

Sec. 5782. *The answer in such case.* It shall be sufficient, in such action, if the defendant in his answer deny, generally, the title alleged in the petition, or that he withholds the possession; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted; and when he does not defend for the whole premises, the answer shall describe the particular part for which defense is made.

R. S. Ohio, 1880, Ch. 10, p. 1396.

(20) OREGON.

SECTION 318. *Complaint.* The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage such sum as may therein be claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.

Sec. 319. *What defendant may give in evidence.* The defend-

ant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession, shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend. In an action against a tenant the judgment shall be conclusive against a landlord who has been made defendant in place of the tenant, to the same extent as if the action had been originally commenced against him.

R. S. Oreg., Ch. 4, Title 1.

(2) PENNSYLVANIA.

SECTION 1. *Form of writ.* All writs of ejectment shall be in the form following, and not otherwise, viz.:

(L. S.) _____ County, ss. The Commonwealth of Pennsylvania:

To the Sheriff of said county, Greeting: You are hereby commanded that you summon A B to appear before the judges of the Court of Common Pleas, in and for said county, to be holden at _____, on the _____ day of _____ next, then and there to answer to a certain complaint made by C D, that he, the said A B, hath in his actual possession a tract of land situate in _____ township, in the said county, containing _____ acres, or thereabouts, bounded by lands of E F G H, the right of possession or title to which, he, the said C D, saith is in him (or them as the case may be), and not in the said A B, all of which the said C D averreth he is prepared to prove before our said court. Hereof fail not.

Witness, J B, President (or judge, as the case may be) of our said court, at _____, the _____ day of _____.

Anno Domini one thousand eight hundred and _____.

Attested: J M, Prothonotary.

Brightly's Purdon's Digest, 531.

Sec. 10. *Description to be filed—When defendant to appear.* It shall be the duty of the plaintiff, either by himself, his agent or attorney, to file, in the office of the prothonotary of the proper county, on or before the first day of the term to which the process issued is returnable, a description of the land, together

with the number of acres which he claims and declares the title is in him. And the defendant shall enter his defense (if any he hath) for the whole or any part thereof, before the next term, and thereupon issue shall be joined.

Brightly's Purdon's Digest, p. 531, § 10.

(22) TENNESSEE.

SECTION 3958. *Declaration.* It is sufficient for the plaintiff to allege, in his declaration, that he was possessed of the premises sued for at the time specified, which should be after his title accrued, and being so possessed thereof, the defendant afterward, on a day stated, entered thereon, and unlawfully withholds the same to the plaintiff's damage, naming the sum.

Sec. 3959. *Estate and premises.* The plaintiff's declaration shall specify the quantity of his estate, and the extent of his interest, according to the truth, and describe the premises with convenient certainty, by metes and bounds, or other appropriate description.

Sec. 3960. *Several counts and parties.* The declaration may contain several counts, and several parties may be named as plaintiffs jointly in one count, and separately in others, but without the consent of the party in person, or by a duly authorized agent, unless he be tenant in common with the party commencing the suit. And if the name of person be used as plaintiff contrary to this provision, the suit shall be dismissed at the cost of the plaintiff, on motion of the defendant, and proof of want of authority.

Sec. 3963. *Not guilty.* The defendant may plead that he is not guilty of unlawfully withholding the premises claimed by the plaintiff, and upon such plea may avail himself of all legal defenses.

Sec. 3964. *Admission of plea.* Such plea admits that the defendant is in possession of the premises sued for, unless he states distinctly, upon the record, the extent of his possession.

Milliken & Vertrie's Code of Tennessee, 1884, p. 762.

(23) TEXAS.

SECTION 4786. *The petition shall state:*

1. The real names of the plaintiff and defendant and their residence, if known.

2. It shall describe the premises by metes and bounds, or

with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and shall also state the county or counties in which the same are situated.

3. The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate, and if he claims an undivided interest, he shall state the same and the amount thereof.

4. That he was in possession of the premises or entitled to such possession.

5. That the defendant unlawfully entered upon and dispossessed him of such premises (stating the date), and withholds from him the possession thereof.

6. If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

7. It shall conclude with a prayer for the relief sought.

Sec. 4787. *Indorsement on petition.* The plaintiff shall indorse on his petition that the action is brought as well to try the title as for damages.

Sec. 4792. *The defendant may file plea of "not guilty" only.* The defendant in such action may file only the plea of "not guilty," which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements he shall state the facts entitling him to the same as provided in the succeeding chapter.

R. S. Texas, 1889, page 703.

(24) WISCONSIN.

SECTION 3077. *What complaint shall set forth.* The complaint in such actions shall set forth that the plaintiff has an estate or interest in the premises claimed, describing them by designating the number of the lot or township, if any, in which they are situated, and, if none, by stating the names of the last occupants of lands adjoining the same, if any, or by metes and bounds, or in some other way so that, from the description given, possession of the premises claimed may be delivered, and shall particularly state the nature and extent of such estate or interest, whether in fee, dower, for life or for a term of years,

specifying such life or lives, or the duration of such term, and that he is entitled to the possession of such premises, and that the defendant unlawfully withholds the possession thereof from him, to his damage such sum as he claims, and may include a claim for special damages for injuries to the freehold by waste, or otherwise, and shall contain a demand for the judgment he claims. The plaintiffs, or any one of them, may recover under such complaint any individual share or interest in the premises claimed, or any separate parcel thereof which may be established in the action.

R. S. Wis. 1878, Ch. 133.

CHAPTER XI.

EVIDENCE.

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§ 1. **Evidence in Ejectment—General Rules.**—The proofs, by which the plaintiff in actions of ejectment is required to maintain the action, not only vary with the nature of the title to the premises in controversy, but are also dependent on the relation which he sustains to the defendant when no privity exists between them, that is when neither the defendant nor those under whom he holds have immediately or derivatively

entered into possession, either by the plaintiff himself or those under whom he claims; the plaintiff must establish such a title to the premises in controversy as will entitle him to the possession of the same unless the defendant shows a better title.¹ Because, as we have already seen, it is by the strength of his own title and not by the weakness of that of his adversary that he must prevail.

In ejectment, the burden is on the plaintiff to establish his right by the strength of his own title; and a denial of title in the answer places on him the burden to establish the genuineness of the signature to a deed under which he claims title. *Weaver v. Whilden* (S. C.), 11 S. E. Rep. 686 (1891).

Under Code Ala. 1886, § 2697, requiring defendant in an action to recover real property to furnish "an abstract of title or titles on which he will rely for defense," a defendant is not prevented from introducing deeds which form no part of, and have no connection with, his own title, but which tend to show the invalidity of plaintiff's title. *Robbins v. Gilligan*, 86 Ala. 254; 5 So. Rep. 568 (1889).

Under Code W. Va. 1868, c. 31, § 68, a tax deed for land, executed in 1870, by a deputy recorder, and duly acknowledged by him in his own name as such deputy, is admissible in evidence in ejectment for said land. *Davis v. Living*, 32 W. Va. 174; 9 S. E. Rep. 84 (1889).

Where the claim of plaintiff in ejectment is possession under claim of title for the statutory period, deeds of the premises under which his devisor claimed, and the plat thereof, are admissible in evidence to show possession under them by such devisor and his grantors, and to show that the premises were known by the name stated in the declaration, and are not liable to the objection that by reason of defects in some of them, they fail to show paper title. *Johnson v. Johnson*, 70 Mich. 65; 37 N. W. Rep. 712 (1888).

Where the grantor in a deed of trust continues to reside on the land with his wife after trustee's sale, it will be presumed that he, and not his wife, is the party in possession, even though he had previously conveyed to her his equity of redemption. *Meier v. Meier* (Mo.), 16; S. W. Rep. 223 (1891).

When defendants claim under a tax sale, plaintiff, by producing his deed and showing possession thereunder, establishes a *prima facie* case. *Zink v. McManus*, 49 Hun, 583; 3 N. Y. Sup. 487.

In ejectment by a purchaser from the grantee against the grantor of a deed absolute which contained an undertaking by the grantee to execute to the grantor a bond to redeed the property "when the said [grantor] shall have paid the sum of \$2,500," defendant pleaded merely a general denial, and on the trial offered evidence which he claimed tended to prove that the deed was in fact executed to secure a debt, but the evidence utterly failed to show such intention: *Held*, that, even if the evidence were competent under the pleadings, the error in excluding it was not prejudicial. *Chandler v. Chandler*, 76 Iowa, 574; 41 N. W. Rep. 319.

Where plaintiffs in ejectment claim title by adverse possession under color of title, the deed under which they claim is admissible in evidence, though it may not have been properly admitted to registration. *Brown v. Brown*, 106 N. C. 451; 11 S. E. Rep. 647.

¹ *Adams on Ejectment*, 310.

A legatee, who was also assignee of another legatee, devised the portion taken by him on the partition to the assignor for life, with remainder to the latter's children, and, after the assignee's death, the assignor recovered the portion in ejectment against the other legatees, and afterward sold it. In ejectment by the children against the purchaser, after the assignor's death, *held*, that evidence of the partition was relevant to establish the assignor's title under the assignee's will, and thus to explain his recovery in the ejectment. *Mellon v. Reed*, 123 Pa. St. 15; Atl. Rep. 906.

Where defendant relies on adverse possession, evidence that plaintiff's grantor claimed the property; that she had paid the taxes thereon; that defendant held an adjoining piece, as her tenant, with which the lot in controversy communicated; and that defendant had repeatedly admitted that he held the property in question as her tenant, supports a verdict in plaintiff's favor. *Von Glahn v. Brennan*, 81 Cal. 261; 22 Pac. Rep. 596 (1890).

In ejectment, defendants offered in evidence the record of a judgment in favor of the administrator of one from whom they derived title against plaintiff's tenant for possession of the land in controversy. Plaintiff objected to its admission on the ground that he was not a party to the action: *Held*, that, while the judgment was not admissible as bearing on the title, it was admissible to show where the right of possession was from the service of summons in the action. *Spotts v. Hanley*, 85 Cal. 155; 24 Pac. Rep. 738 (1891).

In ejectment, one through whom plaintiff derives title can not testify as to the uncommunicated motives or claims with which he took possession of the lands in controversy, but may state the facts showing the character and duration of his possession. *East Tennessee, V. & G. Ry. Co. v. Davis* (Ala.), 8 So. Rep. 349 (1891).

In ejectment against a railroad company, the defense consisting of the record of proceedings for condemnation of the land by the company, the proceedings were held void for defective notices, etc.: *Held*, that the exclusion of evidence, afterward offered, that the land was necessary for the company's business, was not reversible error. *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740; 40 N. W. Rep. 280 (1890).

Where defendant avers that the land "was wholly unoccupied at the time of the said sale, and was then owned *in solido* by the plaintiff," the admission for plaintiff of a record copy of a deed, the deed itself being in his possession, though in another State, to prove title thus admitted by defendant, is harmless error. *West v. Cameron*, 39 Kan. 736; 19 Pac. Rep. 616.

Where defendant in ejectment claims under a title-bond, but has not claimed the legal title till shortly before suit, findings in favor of plaintiff, who holds under a deed conveying the legal title, executed more than thirty years before the suit, the evidence being conflicting, can not be disturbed. *Cox v. Reid* (Ky.), 9 S. W. Rep. 693 (1891).

In an action to recover real estate, plaintiffs claiming as heirs of A, and defendants claiming through a sheriff's deed, under execution sale, against such heirs, the issue being as to the location or quantity of the land in controversy which was actually covered by the sheriff's deed, the admission in evidence of certain papers attached to the execution showing the manner in which the sheriff disposed of the proceeds of the sale, *held* to be immaterial and harmless. *Hammett v. Farmer*, 26 S. C. 566; 2 S. E. Rep. 507 (1887).

In an action for the recovery of land it was a material question whether or not the same had been assigned as dower. Part of the record of the proceedings having been proved to be lost, the plaintiff, in order to show that dower had been assigned, offered in evidence a deed from a former occupant of the land, conveying it to the defendant's father during the life of the tenant in dower. The court charged that if the jury believed that an entry had been made under the deed it was proper to consider it in connection with the acts and declarations of the person so entering: *Held*, correct. *Clifton v. Fort*, 98 N. C. 173; 3 S. E. Rep. 726 (1887).

Where it is proved that land was conveyed to J. in 1768, and has been assessed to his heirs ever since 1805, the original tax-lists of the town for the intervening years are admissible in evidence to show that J. was assessed for said land during said years, where such lists show that J. was assessed for land in said town, though they do not identify the land. *Fuller v. Fletcher*, 44 Fed. Rep. 34 (1890).

A deed of trust is a conveyance of the legal title; and where in an action of ejectment, the plaintiff claims under a conveyance made June 15, 1872, a deed of trust executed by his grantors January 29, 1872, is admissible as tending to show that the title was not in plaintiff's grantors at the time his conveyance was made. The questions of the payment of the debt which the deed of trust was given to secure, and of the reconveyance of the land, do not affect the admissibility of the deed. *Partridge v. Shepard*, 71 Cal. 470; 12 Pac. Rep. 480 (1887).

Two persons claimed the same lands under different patents, by intermediate conveyances from the patentees. It appeared that at one time both patents and the lands in dispute, together with other adjoining tracts, belonged to one G., and that he conveyed under the junior patent first. The description therein was of lands adjoining the tracts in dispute, and the description, as well as lines on the ground and the calls for adjinders, excluded them, and the vendees knew the location of their lines: *Held*, that the title to the disputed lands could not pass, either by the first conveyance by G. or by estoppel, and therefore it was immaterial that the warrants for the surveys of the junior patent were originally located so as to cover them, and the evidence thereof was properly excluded. *Midland Min. Co. v. Lehigh Val. Coal Co.*, 126 Pa. 384; 20 Atl. Rep. 634 (1891).

M. erected a building, the wall of which encroached on two feet of his lot which he had conveyed to R. Having no knowledge of the encroachment, M. and his successors in title made certain deeds and leases, in which the lot was described as "lot 12, excepting the two feet previously conveyed to R." *Held*, that the exceptions could not be treated as declarations by the parties making them that they did not claim the land actually covered by the wall, nor as conclusive evidence that they did not hold it adversely. *Ramsey v. Glenn* (Minn.), 48 N. W. Rep. 322 (1891).

In trespass to try title, plaintiff claimed by mesne conveyances from the patentee, who lived on an adjoining homestead survey, the deed from the patentee being dated in 1868. Defendant claimed under an execution sale on a judgment against the patentee made in 1873. The purchaser at this sale in 1878 conveyed the tract to the sons of the patentee. In 1879 one of the sons died, leaving his mother—the patentee being then dead—and brothers and sisters, as his heirs. These, in 1882, joined with the other son

in a conveyance to defendant. On the patentee's death his family moved to another county, and one M. took possession of the homestead tract, and occupied and paid taxes on it for the widow, and at the same time occupied and paid taxes on the land in controversy for the sons, until the death of the one, when he occupied it for his heirs. He continued to so occupy and cultivate it until the sale, in 1882, to defendant, who took possession, and has since occupied it: *Held*, that the evidence was sufficient to sustain defendant's plea of the five years' statute of limitations. *Motley v. Corn* (Tex.), 11 S. W. Rep. 850 (1891).

Plaintiff and defendant each claimed the land in question through a common grantor. On appeal, it appeared from the record that evidence sufficient to show the locality of the lands in controversy was not produced at the trial: *Held*, that the burden of proof was on plaintiff, and that the judgment in his favor must be reversed. *Garrison v. Coffey* (Tex.), 5 S. W. Rep. 638 (1887).

In ejectment, a deed of land to a third person, with whom plaintiff does not connect himself either by descent or purchase, and which deed describes land with different boundaries than those set out in the complaint, is not rendered admissible, as evidence of plaintiff's title by the testimony of a witness that he had heard that the land mentioned in the deed was that in dispute between plaintiff and defendant. *Brown v. King*, 107 N. C. 813; 12 S. E. Rep. 137 (1891).

Where, in an action of ejectment, one of the parties claims title purchased at a sale under a judgment against a fraudulent grantor, and the other claims title purchased at a sale under a decree against the same grantor, which decree adjudged the conveyance fraudulent, and subjected the land to sale as the property of such grantor, the introduction in evidence, or admission by the latter party of the decree and proceedings upon which it is founded relieves the former from making proof of the fraud in such conveyance. *McClellan v. Solomon*, 23 Fla. 437; 2 So. Rep. 825 (1887).

In ejectment, where plaintiff has produced as proof of his title an executory contract of purchase, nothing being offered to show title of the alleged vendor, or the location or size of the lot, parol evidence as to its size is properly excluded. *Stoinski v. Pulte*, 77 Mich. 323; 43 N. W. Rep. 979 (1890).

In ejectment, where defendant claimed under two judgments, and his title under the senior judgment was alone sufficient to defeat the action, evidence that the junior judgment had been paid, and that the judgment debtor tendered money for the redemption of the land after the time for redemption had expired and the sheriff's deed had been delivered, was immaterial. *Miller v. Pence*, 131 Ill. 122; 22 N. E. Rep. 817 (1890).

Where plaintiff in ejectment has introduced a grant from the State to "J. M., of W. county," dated December 2, 1825, a deed from "J. M., Jr., of W. county," which states that the land was granted to the grantor therein on December 2, 1825, is admissible, where it is shown to come from the proper custody. *Swicord v. Hooks*, 15 Ga. 580; 11 S. E. Rep. 863 (1890).

In ejectment for riparian premises, of which defendant, the city, had been in open, uninterrupted and adverse possession for nineteen years, condemnation proceedings, which were subsequently declared void, instituted by the city during that time to open the wharf along the whole river

front, including the premises in controversy, are inadmissible in evidence to show either title in plaintiff or the character of the city's possession. *Wilkerson v. St. Louis Sectional Dock Co.*, 102 Mo. 130; 14 S. W. Rep. 177 (1891).

Evidence of payment of taxes is admissible to show title by adverse possession.

In trespass *qu. cl. fr.* where plaintiff claims title by adverse possession, and the assessment list does not so particularly describe the property as to render it certain whether or not it included the land in controversy, parol evidence of the tax assessor is admissible to show that the property was assessed to plaintiff. *Wren v. Parker*, 57 Conn. 529; 18 Atl. Rep. 790 (1890).

Both plaintiff and defendant claimed through a patent to an Indian woman, but there was a dispute as to whether their respective grantors were the same persons. Defendant introduced evidence to show that his grantor was an Indian woman, known by the same name as that of the patentee; that she was not at the place where plaintiff's deed was executed at the time it purported to have been executed; that one R. was her brother. He then offered a witness who testified that he was on the land in question in 1866, the year before R. died; that R. was in possession; and that R. told the witness he had selected the land in question for his sister; but the witness was unable to identify the land on which R. was as that described in the patent. The writing containing the selections of land by the Indians was not produced nor accounted for, nor was R. shown to have had any authority to make the selection: *Held*, that as no selection was shown by competent testimony, R.'s declarations were inadmissible. *Sherwood, C. J.*, dissenting. *Brown v. Quinland*, 72 Mich. 289; 42 N. W. Rep. 940 (1890).

In ejectment, defendants offered in evidence the record of a judgment in favor of the administrator of one from whom they derived title against plaintiff's tenant for possession of the land in controversy. Plaintiff objected to its admission on the ground that he was not a party to the action: *Held*, that, while the judgment was not admissible as bearing on the title, it was admissible to show where the right of possession was from the service of summons in the action. *Spotts v. Hanley*, 85 Cal. 155; 24 Pac. Rep. 738 (1891).

Where the person in possession of the deed produces a letter in the handwriting of the administrator of the grantee therein, stating that he sends him the deeds therewith, and advising him to commence suit, this is sufficient evidence that the deed comes from the proper custody. *Swicord v. Hooks*, 85 Ga. 580; 11 S. E. Rep. 863 (1890).

In an action of ejectment, where the defendant claims title under a sale by a trustee under a deed of trust, the deed is admissible in evidence, even though it show that the debt was more than ten years past due at the date of the trustee's sale, the presumption of payment from lapse of time being rebuttable by facts and circumstances, and the question of payment being one, therefore, which could not be determined until the defendant's evidence was all before the court. *Lewis v. Schwenn*, 93 Mo. 26; 2 S. W. Rep. 391 (1887).

§ 2. Where a Privity Exists Between the Parties.—Where there is a privity existing between the parties to the action, as where the relation of landlord and tenant has existed, or where

the plaintiff claims as mortgagee, or where the defendant has been admitted into possession of the premises in controversy, pending a treaty for the purchase or the like, proof of title is not required of the plaintiff but instead thereof the plaintiff should prove the circumstances under which the defendant or those under whom he holds were admitted into possession and that their right to possession had ceased. The same applies also when the privity is not between the immediate parties to the action, with the derivative title of the claimant from the party, by whom the defendant was originally admitted into possession. In these cases the defendant will not be permitted to rebut this evidence, by showing that the title of the claimant was originally defective and insufficient, for it would be contrary to good faith to permit a party to controvert the title of him by whom he has obtained possession;¹ but he is allowed, notwithstanding, to prove the nature of such title, and to show, that although originally a valid one, it expired before the commencement of the action, and that the land then belonged to another, for such a defense is not inconsistent with the terms of the original possession.²

Vendee, under contract of purchase.

Where a person in possession of land, enters into a contract for the purchase of it such act is a recognition of the vendor's title, and precludes the purchaser from denying it; and, in case of forfeiture, he is a mere tenant at will, and not entitled to notice to quit; and, on failure to make payments according to the terms of the contract, an action of ejectment lies to recover the possession. *Whiteside v. Jackson*, 1 Wend. (N. Y.) 418; *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26.

One making a contract to buy land and taking possession under it, though strictly the relation of landlord and tenant is not thus created, yet, the vendee, in ejectment by the vendor against him, is absolutely estopped from either showing title in himself, or setting up an outstanding title in another. *Jackson v. Walker*, 7 Cow. (N. Y.) 637; *Jackson v. Smith*, *Ib.* 717.

Unless the contract were usurious, then, it seems, the tenant is not estopped. *Ib.* 717.

¹ *Jackson v. Stewart*, 6 Johns. (N. Y.) 34; *Jackson v. De Watts*, 7 Johns. (N. Y.) 157; *Doe v. Abrahams*, 1 Stark. 305; *Rennie v. Robinson*, 1 Bing. 147; *Sullivan v. Stradling*, 2 Wils. 208; *Driver d. Oxenden v. Lawrence*, Blk. 1259; *Parker v. Manning*, 7 T. R. 537; *Hodson v. Sharpe*, 10 East, 355; *Doe d. Prichett v. Mitchell*, 1 B. & B. 11.

² *Adams on Ejectment*, 314; *England v. Slade*, 4 T. R. 682; *Doe v. Ramsbottom*, 3 M. & S. 516; *Doe v. Watson*, 2 Star. 230; *Baker v. Mellish*, 10 Ves. jun. 544; *Gravenor v. Woodhouse*, 1 Bing. 38; *Phillips v. Pearse*, 5 B. & C. 433.

Or, "unless he was in some way deceived or imposed upon in making such agreement." *Jackson v. Ayres*, 14 Johns. (N. Y.), 224.

So of any one coming in under him, either with his consent or as an intruder. *Jackson ex dem. Livingston v. Walker*, 7 Cow. (N. Y.), 637.

And, where a third person, G., brought an ejectment against such a vendee, who went into another State, leaving his wife and children in possession of the premises, and G. then persuaded the wife to surrender the possession to him for a compensation, and afterward put a tenant of his into possession, it was held, on an ejectment brought by the vendor against G.'s tenant, that such tenant was estopped from showing G.'s title or any title outstanding against the lessor. *Ib.*

A defendant in ejectment, claiming the land by executory contract of purchase from the plaintiff, will not be permitted to contest the plaintiff's title; and, consequently, will not be permitted to give evidence of the outstanding elder grants covering the same land. *Hamilton v. Taylor*, Litt. Sel. Cas. (Ky.), 444.

The acknowledgment of the defendant that he entered under such contract with the plaintiff, may be proved without producing the contract. *Ib.*

Defendant in execution.

A person purchasing land under an execution is substituted in the place of the defendant; and, in ejectment by the landlord, can not set up a title in a third person. *Jackson v. Graham*, 3 Caines (N. Y.), 188.

Neither can the defendant set up a title in a third person against the purchaser. *Ib.*

In ejectment by a purchaser under a *fi. fa.* against a person in possession, under the debtor, without title, or collusively, the defendant can not set up an outstanding title in a third person. *Jackson v. Bush*, 10 Johns. (N. Y.) 223.

Landlord and tenant.

A tenant holding over, after a lease expired, can not controvert his landlord's title. *Jackson v. Stiles*, 1 Cow. (N. Y.) 575.

Nor, if he take a lease from a third person, on being ejected, will that third person be allowed to defend as landlord. *Ib.*

The latter claiming under the tenant has no greater right to a defense than the tenant would be entitled to. *Ib.*

Defendant inclosed a small piece of waste land by the side of a public highway, and occupied it for thirty years without paying any rent; at the expiration of that time the owner of the adjoining land demanded sixpence rent, which defendant paid on three several occasions. In ejectment, *held*, that this, in the absence of other evidence, was conclusive to show that the occupation of defendant began by permission, and entitled the plaintiff to a verdict. *Doe v. Wilkinson*, 3 Barn. & C. 413.

Although a tenant can not deny the title of his landlord under which he entered, it is competent for him to show that it has terminated either by its original limitation, or by conveyance, or by the judgment and operation of law. *Sutherland, J., Jackson v. Davis*, 5 Cow. (N. Y.) 135.

A tenant may impeach his landlord's title whenever he can show that he was induced to take a lease by misrepresentation and fraud. *Miller v. M'Brier*, 14 Serg. & R. (Penn.) 382.

A clear subsisting title outstanding in another, means such a title as a stranger could recover on in ejectment against either of the contending parties. *Hall v. Gittings, Jr.'s, Lessee*, 2 Har. & J. (Md.) 122.

A plaintiff in ejectment can never recover, unless he show in himself a right of entry; therefore, it is competent to the defendant to show that the land is covered by an older patent, because that disproves the plaintiff's right of entry. *Botts v. Shield's Heirs*, 3 Litt. (Ky.) 35.

Acceptance of a lease for a small part of land does not estop the defendant in ejectment from controverting the plaintiff's title to the residue of the tract. *Pedrick v. Searle*, 5 Serg. & R. (Penn.) 236.

Though the rule that the tenant is estopped to deny the title of his landlord, is an universal one, not merely technical, but founded in public convenience and sound policy, and though the person once a tenant, will, *prima facie*, be deemed to continue in that character so long as he remains in the occupation of the land demised, yet it is competent for such person to show that the relation has been dissolved; and this being done, he will be permitted to controvert the title under which he formerly held. *Camp v. Camp*, 5 Conn. 291.

A defendant in ejectment who has paid rent to the lessor of the plaintiff, may show that his landlord, pending the term, sold his interest in the premises. *Doe v. Watson*, 2 Stark. 204, 228.

Where a man claiming under an executory contract is evicted and turned out of possession by a writ of *habere facias possessionem* on an adversary claim, he may purchase in such adversary claim, and assert it in defense of a suit brought by the man from whom he first purchased. *Chiles v. Bridges' Heirs*, Litt. Sel. Cas. (Ky.) 420.

Whether there be a tenancy or not, is matter of fact, and the tenant may produce parol evidence to disprove the existence of it. *Jackson v. Vosburgh*, 7 Johns. (N. Y.) 186.

In an action of ejectment the court has no power to compel the defendant to consent to a survey of the premises in his possession. *Jackson ex dem. Van Rensselaer et al. v. Hogaboom*, 9 Johns. (N. Y.) 83.

Where the plaintiff and the defendant claim under adjoining patents, the court can not grant a rule ordering the lessors of the plaintiff to permit a survey to be taken of the boundary line; but if it appear necessary for the defense in the suit, that it should be ascertained, they will allow a rule to stay proceedings till the lessors consent to a survey, or the judge at the circuit may postpone the cause on the same principle. *Jackson v. Murphy*, 3 Caines (N. Y.), 82.

An agreement admitting the defendant in ejectment to be in possession of the land in controversy, does not preclude the plaintiff from showing how the defendant got into possession. *Ruggles v. Gails*, 2 Rawle (Penn.), 232.

The parol declarations of one in possession of lands, as to the nature and extent of his interest, no legal title being shown in him, are admissible against him as evidence, and against those who claim under him, unless it appear that there is higher testimony as to the matter sought to be shown by parol. *Jackson v. Cole*, 4 Cow. (N. Y.) 587.

In ejectment a witness may be asked whether one was in possession of a tract of land, but not whether in possession of a particular part, or of a

house, unless located in the plots filed in the cause. *Hawkins' Lessee v. Middleton*, 2 Har. & M'Hen. (Md.) 119.

§ 3. Identity of the Premises and Possession in the Defendant.—The plaintiff must in all cases establish by competent evidence, the identity of the lands in question and the possession of them by the defendant at the time of the commencement of the suit. The identity of the lands is a mere matter of comparison and the possession of the defendant may be shown by the payment of rent, by the admission of the defendant, or by any other competent evidence of the fact; it being merely matter of fact, provable like other facts by parol evidence or otherwise.¹

In England, under the consent rule, the possession of the premises by the defendant was admitted by the consent rule,² and in many of the States it is not necessary to prove the same in the defendant unless he denies his possession by a plea to that effect. As an illustration we quote the statute of Illinois.

§ 22. It shall not be necessary for the plaintiff to prove that the defendant was in possession of the premises, or claims title or interest therein at the time of bringing the suit, or that the plaintiff demanded the possession of the premises, unless the defendant shall deny that he was in such possession, or claims title or interest therein, or that demand of possession was made, by special plea, verified by affidavit. Laws 1855, 138.

A finding, evidently by mere inadvertence, that plaintiff in ejectment was in possession of the premises at the commencement of the suit, will not necessarily be fatal to a judgment in his favor, where the pleadings admit defendant's possession at the commencement of the suit. *Fisher v. Slattery*, 75 Cal. 325; 17 Pac. Rep. 325.

The testimony of witnesses who have lived on the premises and are familiar with the character of the fences, and who testify that the fences maintained by the adverse holder were sufficient to keep out stock, is admissible. *Silverer v. Hansen*, 77 Cal. 579; 20 Pac. Rep. 136 (1889).

§ 4. Identification of Grantees.—The question of the identification of grantees frequently arises where different persons by the same or similar names are claiming as grantees under the same deed of conveyance or other muniment of title. The fact as to which of the claimants take the estate is one to be established by evidence the same as other questions in dispute. And where the question arises as to the identification of grant-

¹ 2 Greenleaf on Evidence, § 308; ² See the current rule, chapter I Adams on Ejectment, 318; Tilling- Adams on Ejectment, 318, 328. hast's Adams on Ejectment, 248; Jackson v. Vosbury, 7 Johns. (N. Y.) 186.

ees named in ancient deeds or other conveyances of land making up the claim of title,¹ the same rule of law applies. But where the persons in question are father and son, the presumption of law is that the father and not the son is the person intended as grantee; this, like all other presumptions of law, however, may be overcome by evidence.²

§ 5. The Plaintiff's Evidence When His Title Can Be Controverted.—In order to entitle him to a recovery of the lands in dispute the plaintiff must show legal estate in himself at the time of the commencement of the suit, a right of entry, and that the defendant or those claiming under him was in the possession of the premises at the time the suit was commenced.³

§ 6. Where the Plaintiff Claims Title by an Ordinary Grant.—Where the plaintiff claims title to the lands sought to be recovered by an ordinary grant, the burden is upon him to show the title in himself by a claim of legal conveyances from some recognized source of title. In this country the universal method by which titles to real property are transferred, is by formal instruments in writing, called deeds. The general form and essential parts of these instruments are discussed in the chapter on muniments of title.⁴

§ 7. When the Plaintiff Claims Title by Descent—Burden of Proof.—When the plaintiff claims title by descent to the premises in dispute, he is of course either (1) a lineal heir or descendant or (2) a collateral heir or descendant.

(1.) If he claims as a lineal heir, he must prove that his ancestor, from whom he derives his title, was the person last seized of the premises, as his inheritance, and that he is the heir of such ancestor. These facts may, in the first instance, be established by showing that the ancestor was either in actual possession of the premises at the time of his death and within the period of the statute of limitations, or in the receipt of rent from the person in possession (such possession being *prima facie* evidence of a seizin in fee), and his descent.

(2.) If he claims as a collateral heir, he must show the de-

¹ Graves v. Colwell, 90 Ill. 613 (1878). ² 2 Greenleaf on Evidence, § 304;

³ State v. Vittam, 9 N. H. 519; 2 Daniel v. Lefevre, 19 Ark. 202 (1857); Wharton's Ev., § 1273; Lepiot v. Tillinghast, Adams on Ejectment, 247; Browne, 6 Mod. 198; Kincaid v. How, Fleming v. Johnson, 26 Ark. 421 10 Mass. 203; Padgett v. Lawrence, (1871); 6 Am. & Eng. Ency., 245 k.

⁴ 10 Paige (N. Y.) 170; Graves v. Colwell, 90 Ill. 613. Chapt. XIV.

scent of himself and the person last seized from same common ancestor, together with the extinction of all those lines of descent which would claim before him. These facts may be established by proving the marriages, births and deaths necessary to complete his title, and the identity of the persons.¹

The rule stated in Adams on Ejectment.

The testimony of persons present when the events happened, or who knew the parties concerned at those periods, and the production of extracts from parish registers, are the most satisfactory modes of proving facts of this nature; and when the claimant is the lineal descendant of the person last seized, but little difficulty can arise in procuring the necessary proofs. But when he claims as collateral heir, and it is necessary to trace the relationship between him and the person last seized through many descents to a common ancestor, difficulties often intervene, from the remoteness of the period to which the inquiries must be directed, which, upon the ordinary rules of evidence, would be insuperable. To remedy this evil, the courts, from the necessity of the case, have relaxed those rules in inquiries of this nature; and allow hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact, handed down from one to another) to be admitted as evidence in cases of pedigree. Adams on Ejectment, 325; Higham v. Ridgway, 10 East, 120.

§ 8. **Seizin of the Ancestor.**—The seizin or the possession of the ancestor may be (1) actual, as where he was himself in possession, or (2) it may be constructive, as where he was in possession by his tenants or persons holding under him.

As a general rule seizin of the ancestor is proved by showing his actual possession of the premises or his receipt of rent from his tenants or persons holding under him. Such being shown, it is presumptive evidence of a seizin in fee and is sufficient until overcome by evidence. The declarations of a deceased occupant of lands that he held them as tenant under a particular person, are competent as evidence of seizin in that person.²

Seizin of the ancestor may be proved by showing that he was either in the actual possession of the premises at the time of his death, or in the receipt of rent from the *ter-tenant*; for possession is presumptive evidence of a seizin in fee, until the contrary be shown. But if it is probable that the defendant will rebut this presumption, the lessor should be prepared with other proofs of his ancestor's title. Adams on Ejectment, 324.

In ejectment by the heirs of a wife against the grantees of the husband, on the ground that the land came to the wife through her father, and therefore descended to her heirs, declarations of the husband that such was the

¹ See also, 2 Greenleaf on Evidence, 3 W. Bl. 1099; Richards v. Richards, § 309; Tillinghast's Adams on Ejectment, 253; Jackson on Real Actions, 157; Co. Litt. 11 b; Jenkins v. Pritchard, 2 Wils. 45; Bull. N. P., 102, 103; 2 Bl. Comm., 208, 209; Roe v. Lord, 15 East, 294, n; 2 Phillips on Evidence, 282; 2 Starkie on Evidence, 298. ² 2 Phillips on Evidence, 282.

fact, and that he had only a life estate in the land, are admissible, and such declarations are not objectionable, as tending to vary the terms of a deed from the wife's brothers to the husband and wife, where the deed, though reciting a consideration, was not executed by the wives of the brothers, and was claimed to be a deed of partition. *Dooley v. Baynes*, 86 Va. 644; 10 S. E. Rep. 974 (1890).

If it be proved, on a trial in ejectment, that the father of the lessor of the plaintiff, who devised the land to him, was in possession thereof many years before until his death, and that the lessor of the plaintiff afterward conveyed it to a person who was in possession at the time of his death, the jury may presume that the lessor of the plaintiff was in possession from the death of his father to the date of the conveyance, if it be not proved that some other person in the mean time had the possession. *Moore v. Gilliam*, 5 Munf. (Va.) 346.

Evidence that, although the common grantor had the legal title to the property in question, she in fact held it in trust for plaintiff and his assignors, to whom it equitably belonged, is not admissible. *Geiges v. Greiner*, 68 Mich. 153; 36 N. W. Rep. 48 (1888).

§ 9. **Actual Entry Not Necessary.**—It is not necessary that the possession should be taken by an actual entry of the person in whom the seizin is alleged. It may be gained by the entry of his guardian or by the possession of a tenant for years of his ancestor. A seizin may also be gained by the entry of a co-parcener, a joint tenant or a tenant in common, as where the seizin of one is the seizin of all.¹

A seizin may be gained by the entry of a co-parcener, joint tenant or tenant in common; or by the entry of a person entering in the name of him who is entitled to the land, though without a precedent command or subsequent assent. *Smales v. Dale*, 1 Hob. 120; Co. Litt. 245a, 258a.

If a stranger enter into the lands of an infant, he will be considered as entering as guardian; and the entry of such person will make a *possessio patris*, so as to answer the maxim *possessio patris facit sororem esse hæredem*—"the brother's possession makes the sister the heiress." *Watkins on Descents*, 64; Co. Litt. 89; *Morgan v. Morgan*, 1 Atkyn. 489; *Dormer v. Fortescue*, 3 Ib. 130; *Doe v. Keen*, 7 T. R. 386.

§ 10. **A Mere Entry no Proof of Title.**—A mere entry on land without any actual possession of it, affords no sufficient proof of title, even against a person who subsequently takes and holds possession of the estate. A mere possessory right is the lowest title known to the law. Proof of entry only, without some acts of ownership or continued possession or occupation, will not sustain such a title. It must appear that a party claiming land by possession has entered thereon, and has indicated in some way the extent of his claim, and that possession

¹ 2 Phillipps on Evidence, 282.

thereof followed the entry, and was kept up according to the nature and situation of the property.¹

§ 11. **Ouster a Question of Fact—Burden of Proof.**—Ouster is a question of fact which it is the province of the court or jury to determine, and when the trial is by jury, the facts and circumstances which go to establish the ouster should under proper instructions from the court be submitted to the jury,² and the burden of proof to establish the ouster rests upon the party alleging it.³

§ 12. **Possession—Evidence of Ownership.**—The rule is well settled in actions of ejectment that proof of possession of land by a party claiming to be the owner in fee, is *prima facie* evidence of his ownership and seizin of the inheritance. It is sufficient, therefore, for a plaintiff, in order to make *prima facie* proof of title, to trace his title back to an immediate or remote grantor or to an ancestor who, at the time of his conveyance or death, was in possession of the land, claiming it in fee.⁴

Where, in ejectment, the defendant gave evidence to show that certain lands of D. C., under whom the lessor of the plaintiff claimed title, were forfeited by an act of attainder: held, that this was *prima facie* evidence that the title to the premises in question was once in D. C., and that the plaintiff might, without further proof of the title in D. C., proceed to deduce a title from him. *Jackson v. Cole*, 4 Cow. (N. Y.) 587.

If a naked power to sell be given to executors, the land, in the meantime, descends to the heir, and an ejectment may be brought for it in his name. *Brown v. Dysinger*, 1 Rawle (Penn.) 408.

§ 13. **Declaration of Persons in Possession.**—The declarations of a person in possession of lands in disparagement of his own title, are admissible in evidence against him, and those claiming under him, but declarations in favor of his own title are inadmissible.⁵

¹ *Nichols v. Todd*, 68 Mass. 568 (1854); *Cook v. Rider*, 16 Pick. (Mass.) 186, 188. ² *Newell v. Woodruff*, 30 Conn. 492; *Van Bibber v. Ferdinand*, 17 Md. 436; *Highstone v. Burdette*, 54

³ *Highstone v. Burdette*, 54 Mich. Mich. 329.

⁴ *Bailey, J.*, in *Anderson v. McCollor* v. Hill, 10 Leigh. (Va.) 457; *mick*, 129 Ill. 309 (1889); *Davis v. Cummins v. Wyman*, 10 Mass. 465; *Easley*, 13 Ill. 192; *Barger v. Hobbs*, *Purcell v. Wilson*, 4 Grat. (Va.) 16; 67 Id. 592; *Keith v. Keith*, 104 Id. *Harman v. James*, 7 Smedes & M. 397; *Harland v. Eastman*, 119 Id. 22. (Miss.) 111; *Blackmore v. Gregg*, 2 ⁵ *Simpson v. Dix*, 131 Mass. 179 *Watts & S. (Pa.)* 182; *Carpenter v.* (1881); *Osgood v. Coates*, 1 Allen *Mendenhall*, 28 Calif. 484; *Clark v.* (Mass.) 77 (1861). *Crego*, 47 Barb. (N. Y.) 593.

Applications of the rule.

The declarations of an occupant of land, in disparagement of his title, are admissible in evidence against one subsequently attaching and levying upon the land as his property.

Upon the issue, on the trial of a writ of entry, whether the tenant, or his father of the same name, under whom the demandant claimed, was grantee in a deed of land to one of that name, the bill of exceptions showed that the demandant introduced evidence tending to show that the father was grantee, that the deed was delivered to him, that after the delivery of the deed, he made declarations as to the property when digging a cellar upon the premises, which was excluded in evidence without exception by the demandant.

The tenant introduced evidence that his father bought the land with his money; that his father gave him a deed of the land after the action was commenced, and not before, and declarations of the father when digging the cellar that he bought the land for the tenant, that is, when asked what he was doing, he replied: "For my son James, who has come from the war a cripple, and has sent home and saved from his bounty and pay about \$300. I wish to get him a place so that when I die James will have a home." The demandant in reply offered evidence of the declarations of the father to other persons, when digging the cellar, and before the action was commenced, that the land was his. "It was all paid for and I have a deed of it and the land is mine." This evidence was excluded. It was not contended that these declarations were part of the declarations of the father, put in evidence by the tenant. *Held*, that their exclusion, when offered in rebuttal, gave the demandant no ground of exception. *Pickering v. Reynolds*, 119 Mass. 111 (1875).

§ 14. Declarations of Deceased Occupants—The Law Stated by Adams.—The declarations of deceased occupiers are also admissible in evidence for many important purposes. Thus, a declaration by a deceased occupier, that he held the premises of A. B., is *prima facie* evidence of the seizin of A. B.; a memorandum signed by a deceased owner of a copyhold tenement, who occupied a slip of garden adjoining, stating that no part of the garden ground belonged to the copyhold, but that he paid rent for the whole of it, is evidence to show that the garden ground formed no part of the copyhold tenement; a deed executed by a deceased party while in possession, charging the land with an annuity, in which he states S. to be the legal owner, is evidence for S. Declarations of deceased occupiers are also admissible, for the purpose of proving that any particular lands formed part of the estate they occupied; and statements of deceased occupiers touching their title, are admissible

in evidence generally, without reference to the particular effect they may produce in the cause.¹

§ 15. **Proof of Death.**—The fact of the death of the ancestor may be established in various ways, the most common of which is by the evidence of witnesses who were present at the dissolution or saw the deceased afterward. The issuing of letters testamentary or of administration upon his estate is in general *prima facie* evidence of the death of the testator or intestate.² Death may also be proved by the continuous and general reputation of the community to which the party belongs as well as by the general reputation in his family.³

§ 16. **The Presumption of Human Life.**—At common law the presumption of the continuance of human life ends in general at the expiration of seven years from the time when the person was last known to be living;⁴ but such death may, under particular circumstances, be presumed in a shorter time: as where a party sailed in a vessel which was never afterward heard of.⁵ Proof also of the fact that a tenant for life has not been seen or heard of for fourteen years, by a person residing near the estate, although not a member of the family, is *prima facie* evidence of his death.⁶ There is, however, no legal presumption as to the exact time of the party's death, who has not been heard of for seven years; and if the fact of his being alive or dead at any particular period during the seven years is important, it must be proved by the party relying on it.⁷

§ 17. **Proof of Death — By General Reputation.**—The ordinary rule is that it is general reputation among the kindred

¹ Adams on Ejectment, 320; Peaceable v. Watson, 4 Taunt. 16; Doe v. Green, Gow. 227; Doe v. Jones, Camp. 367; Doe v. Coulthred, 7 Ad. & E. 235; Davies v. Pierce, 2 T. R. 53; Outram v. Morewood, 5 T. R. 121; Ivat v. Finch, 1 Taunt. 141; Carne v. Nicoll, 1 Bing. (N. C.) 430.

² Belden v. Meeker, 47 N. Y. 307; Carroll v. Carroll, 2 Hun (N. Y.), 609; 19 Am. Rep. 144; Hurlburt v. Van Worner, 14 Fed. Rep. 709; Comstock v. Crawford, 3 Wall. (U. S.) 396; Welch v. N. Y. C. R. Co., 53 N. Y. 610; 1 Greenleaf on Evidence, § 550.

³ Tisdale v. Conn. Ins. Co., 26 Iowa. 170; Cochrane v. Libby, 6 Shep. (Me.) 39; Lancaster v. Washington Life Ins. Co., 62 Mo. 121; Anderson v. Parker, 6 Calif. 197; Eastman v. Martin, 19 N. H. 152; Mason v. Ful-ler, 45 Vt. 29.

⁴ 19 Car. II, c. 6, s. 1; Doe d. George v. Jesson, 6 East, 80; Roe v. Hasland. Blk. 404.

⁵ Watson v. King, 1 Stark. 121.

⁶ Doe v. Deakin, 4 B. & A. 433.

⁷ Doe v. Nepean, 5 B. & Ad. 86; see Adams on Ejectment, 327.

only of a deceased person, that is admissible in proof of death, but this rule has been relaxed in cases where the deceased left no kindred that are known, and in such cases reputation among the acquaintances of the deceased is sufficient proof of the fact.¹ In a population as unstable as ours, and comprising so many persons whose kindred are in distant lands, the refusal of all evidence of reputation in regard to death, unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice.²

§ 18. **Pedigree of the Plaintiff.**—After the proof of seizin in the ancestor the plaintiff must show that either he is a lineal descendant from, or, if he claims collaterally, that they are both of them sprung from the same common ancestor, and that all the branches interposed between the plaintiff and the ancestor which, if in existence, would have a preferable title, are extinct.³

Where the lessor of the plaintiff claimed as heir by descent, and showed the death of his elder brothers, but did not prove that they died without issue, the court said: "This must likewise be proved. The plaintiff must remove every possibility of title in another person before he can recover; no presumptive being to be admitted against the person in possession." *Richards v. Richards*, 15 East, 294, note.

The law in Adams on Ejectment.

In order to show the heirship of the claimant, he must prove his descent from the person last seized, when he claims as lineal heir, or the descent of himself and the person last seized from some common ancestor, or at least from two brothers or sisters, if he claims collaterally; together with the extinction of all those lines of descent which would claim before him. This is done by proving the marriages, births, and deaths, necessary to complete his title, and showing the identity of the several parties. Thus, supposing A, the claimant, and B, the person last seized, to be cousins, descended from a common ancestor C, B being the only child of D, the elder son of C, and A the only child of E, the younger son of C. In this case A must prove the marriage of C, the birth and marriage of D, the birth, marriage, and death of E, the birth and death without issue of B, and his own birth, for it is a maxim of law, that he who asserts the death of another, who was once living, must prove his death, whether the affirmative issue be that he be dead or living. *Adams on Ejectment*, 324; *Roe v. Lord*, 2 Blk. 1099; *Richards v. Richards*, 15 East 294, n.; 2 Blk. Comm. 208, etc.; *Wilson v. Hodges*, 2 East, 312.

¹ *Scott's Lessee v. Ratcliff*, 5 Pet. East, 293; *Doe v. Wolley*, 8 B. & C. (U. S.) 81 (1831). The reputation of 22.

a family may also afford presumptive evidence of the death of a person (1869).

without issue. *Doe v. Griffin*, 15 ² *Ringhouse v. Keever*, 49 Ill. 470 ³ 2 *Phillipps on Evidence*, 283.

§ 19. **Questions of Pedigree.**—Questions of pedigree form an exception to the general rule rejecting hearsay evidence. This exception has been recognized on the ground of necessity; for as, in inquiries respecting relationship and descent, facts must often be proved which occurred many years before and were known but to few persons, it is obvious that the strict enforcement of the ordinary rules of evidence in cases of this nature would frequently occasion a grievous failure of justice. Courts have therefore so far relaxed these rules in matters of pedigree, as to allow parties to have recourse to traditional evidence, often the sole species of proof which can be obtained. Still, it is not considered safe to admit such evidence without qualification; and though it was long doubtful whether the declarations of servants, friends, and neighbors, might not be received, the settled rule of admission is now restricted to hearsay proceeding from persons who were *de jure* related by blood or marriage to the family in question, and who, consequently, may be supposed to have had the greatest interest in seeking, the best opportunity for obtaining, and the least reason for falsifying, information on the subject.¹

§ 20. **Pedigree—Evidence of Hearsay and Reputation.**—Mr. Justice Le Blanc considered the rule of evidence in cases of pedigree as a departure from the strict rules of evidence, on account of the great difficulty of proving remote facts in the ordinary way by hiring witnesses, and on this ground he said: "Hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact) have been admitted as evidence in cases of pedigree."² And Lord Eldon said: "The tradition must be from persons having such a connection with the party to whom it relates, that it is likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken."³ To render hearsay evidence of declarations as to pedigree compe-

¹ 2 Taylor on Evidence, 560; 1 Young, 13 Ves. 147; Goodright v. Greenleaf on Evidence, § 104; Jewell Moss, 2 Cowp. 594; Whitelocke v. Jewell, 1 How. (U. S.) 231; 17 Pet. Baker, 13 Ves. 514; Monkton v. Atty.- (U. S.) 213; Jackson v. Browner, 18 Gen., 2 Russ. & M. 159.

Johns. (N. Y.) 37; Chapman v. Chapman, 2 Conn. 347; Waldron v. Tuttle, 4 N. H. 371; Johnson v. Lawson, 2 Bing. 86; 9 Moore, 183; Crease v. Barrett, 1 C. M. & R. 928; Vowles v. Higham v. Ridgeway, 10 East, 120; Jackson v. Garland, 18 Johns. (N. Y.) 38 (1820).

³ Whitelock v. Carter, 13 Ves. 514.

tent, it must in general appear that the declarant was a deceased member of the family, related by blood or marriage, whose history the fact concerns.¹

§ 21. **Conduct of Relatives.**—The tacit recognition of relationship and the devolution of property is competent as evidence from which the opinion and belief of the family may be inferred and as resting ultimately on the same basis as evidence of family traditions. For since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material in order to determine this question to ascertain how he was treated and acknowledged by those who sustained toward him any relations of blood or of affinity.²

“If the father is proved to have brought up the party as his legitimate son this amounts to a daily assertion that the son is legitimate.” *Mansfield in The Berkeley Peerage Case*, 4 Camp. 416.

The law raises a presumption of the legitimacy of the issue of a married woman. So the concealment of the birth of a child from her husband, the subsequent treatment of the child by the person who, at the time of its conception, was living in a state of adultery with the mother, and the fact that the child and its descendants assumed the name of the adulterer and had never been recognized in the family as the legitimate offspring of the husband, are circumstances competent as evidence tending to rebut the presumption. *Hargrave v. Hargrave*, 2 C. & Kir. 701; 1 *Greenleaf on Evidence*, § 106; *Goodright v. Sard*, 4 T. R. 356; 2 *Taylor on Evidence*, 571.

§ 22. **Entries in Bibles, etc.**—Entries made by parents or relatives in bibles,³ prayer-books,⁴ missals,⁵ almanacs,⁶ or other books, documents or papers,⁷ stating the fact and date of the birth, marriage,⁸ or death of a child, or other relation, are competent as the written declarations of the deceased persons who made them. Entries in the family bible or testament are competent without proof that they have been made by a relative; for this book is the ordinary register of families, usually access-

¹ *Jackson v. Garland*, 18 Johns. (N. Y.) 38; *Abbott's Trial Evidence*, 91; 1 *Greenl. Ev.*, p. 126, § 103.

² 2 *Taylor on Evidence*, 571; 1 *Greenleaf on Evidence*, § 106.

³ *Berkeley Peer.*, 3rd quest, 4 Camp. 401.

⁴ *Leigh Peer.*, Pr. Min. 310.

⁵ *Slane Peer.*, Pr. Min. pt. 2, p. 49; 5 Cl. & Fin. 41.

⁶ *Herbert v. Tuckal*, T. Ray. 84.

⁷ *Berkeley Peer.*, 3rd quest., 4 Camp. 418; see *Jackson v. Cooley*, 8 Johns. (N. Y.) 128, 131; *Douglas v. Saunderson*, 2 Dall. (U. S.) 116; *Carskadden v. Poorman*, 10 Watts (Penn.), 82.

⁸ In the *Sussex Peer.*, an entry made by the mother of the claimant in her prayer-book, declaring the fact of her marriage, was admitted in evidence. 11 Cl. & Fin. 85, 98.

ible to all its members, and the presumption is that the whole family have more or less adopted the entries contained in it, and have thereby given them authenticity.¹ This presumption will not prevail in favor of an entry in any other book, however religious its character may be, but proof must be given, either that the entry was made by some member of the family,² or that it has been acknowledged or treated by a relative as a correct family memorial, or at least, if ancient, that it was made at the time when it purports to have been written. The evidence of witnesses conversant with old manuscripts is admissible to show their genuineness, though not entitled to much weight.³

It has been held that the death of an individual can not be proven by family tradition, nor by entries in a family bible, unless there is no living witness of the fact. *Fosgate v. The Herkimer Manf. Co.*, 12 Barb. (N. Y.) 352.

Entries in family bibles are not evidence, if recently made, and the person who made them is in court. They are only received when there is no living witness who can speak to the recorded fact. *Leggett v. Boyd*, 3 Wend. (N. Y.) 379; *Fosgate v. Herkimer Manf. Co.*, 12 Barb. (N. Y.) 352; *Russell v. Schuyler*, 22 Wend. (N. Y.) 237.

§ 23. Private Papers, Family Deeds, Correspondence, etc.—The correspondence of deceased members of the family upon proof of the handwriting is competent in matters of pedigree,⁴ as is also recitals in marriage settlements⁵ and family deeds,⁶ descriptions in wills,⁷ and the like.⁸

A canceled will was admitted in evidence upon proof being made that it was found among the papers of a descendant of the testator who appeared to have kept it as containing statements relative to the family. *Doe v. Pembroke*, 11 East, 504.

Recitals of descent and description of parties in deeds and other family

¹ *Berkeley Peer.*, 4 Camp. 421, per Lds. Ellenborough and Redesdale; *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 162, 163, per Ld. Brougham; *Hubbard v. Lees*, 35 L. J. Ex. 169; 1 Law Rep. Ex. 255; 4 H. & C. 418.

² *Tracy Peer.*, cited *Hubb. Ev. of Suc.* 673; *Crawford & Lindsay Peer.*, 2 H. of L. Cas. 558-560.

³ *Adams on Ejectment*, 327; *Taylor on Evidence*, 572; 1 *Greenleaf on Evidence*, § 104; *Hood v. Beauchamp*, 8 Sim. 26; *Tracy Peer.*, 10 Cl. & Fin. 154; *Whitlocke v. Baker*, 13 Vez. 514; *Vowels v. Young*, 13 Vez. 148.

⁴ *Greenleaf on Evidence*, § 104; 2

Taylor on Evidence, 573; *Huntington v. Peer.*, Att'y Gen. Rep. 357; *Kidney v. Cockburn*, 2 Russ. & M. 168; *Butler v. Mountgarret*, 6 Ir. L. R. N. S. 77; 7 H. L. Cas. 633; *Marchmount Peer.*, Pr. Min. 345, 353.

⁵ *Ibid.*; *Neal v. Wilding*, 2 Stra. 1157; *De Roos Peer.*, 2 Coop. 541; *Chandos Peer.*, Pr. Min. 110; *Devan Peer.*, by *Nicholas*, 1832, App. 44, 46.

⁶ *Ibid.*; *Snith v. Tebbitt*, 1 L. R. P. & D. 354; 56 L. J., Pr. & Mat. 35.

⁷ *Vulliamy v. Huskisson*, 3 Y. & C. Ex. R. 82.

⁸ 2 *Taylor on Evidence*, 573.

instruments will be received, provided they came from the proper custodian and are proved, or may from age be presumed to have been executed by some member of the family to which the statements refer. 2 Taylor on Evidence, 573; Stokes v. Dowes, 4 Mason (U. S.), 268; Hungate v. Gascoigne, 2 Coop. 407.

The execution of the deed by a relative is an indispensable requisite; so where an indenture of assignment, which recited that the assignee was the son of certain parties, was executed alone by the assignor, who was not a member of the family, it was held incompetent and rejected. Shaney v. Mode, 1 Myl. & Cr. 338; 2 Taylor on Evidence, 574.

Where a deed of conveyance in which the grantors recited the death of a man's sons, who were tenants in tail male, and declared themselves heirs of the bodies of his daughters, who were devisees in remainder, it was held incompetent and inadmissible to show a pedigree. Fort v. Clark, 1 Russ. 604; see 1 Phillpotts on Evidence, 219.

§ 24. **Declarations—The Law Stated by Adams.**—The declarations of deceased members of the family, whether relations or connections by marriage, are admissible in evidence to prove relationship; as who a person's grandfather was, or whom he married, or how many children he had, or as to the time of a marriage or of the birth of a child and the like. So, likewise, the declarations of deceased persons, as to the fact and time of their own marriages, and whether their children were born before or after marriage, are admissible, though such declarations can not be received to bastardize their children born in wedlock. Where, likewise, a canceled will of a deceased ancestor was found amongst the papers of the person last seized, it was allowed to be read in evidence as a paper relating to the family; the place in which it was found being considered as amounting to its recognition, by the party last seized, as the declaration of his ancestor concerning the state of his family.¹

Defendants may show the conversation of their ancestor, had at the time with a person whom he removed from the land, not as declaration of title, but as part of the *res gestæ*, to explain an act done under a claim of ownership, and it was error to admit only what was said by the person removed. Bunch v. Bridgers, 101 N. C. 58; 7 S. E. Rep. 584 (1888).

It was shown that defendant in ejectment had rented the land in controversy from the ancestor of plaintiff's grantor, but that the lease had been canceled; both lessor and lessee signing the cancellation on the records. Defendant then remained in possession of the premises for more than ten years, and built a residence thereon, claiming to be the owner. There was

¹ Adams on Ejectment, 326; Good-East, 193; Doe v. Lord Pembroke, 11 right v. Moss, Cowp. 591; May v. East, 505.
May, B. N. P. 112; Rex v. Luffe, 8

evidence of declarations made by such ancestor recognizing defendant as the owner: *Held*, that the evidence warranted a verdict for defendant. *Meridian Land & Industrial Co. v. Ball* (Miss.), 8 So. Rep. 316 (1891).

§ 25. **Inscriptions on Tablets, Tombs, etc.**—Inscriptions on tombstones,¹ coffin plates,² mural monuments,³ family portraits,⁴ engravings on rings,⁵ hatchments,⁶ charts of pedigree⁷ and the like are also competent on the question of pedigree. And where such inscriptions are proved to have been made by or under the direction of a deceased relative they are admitted as his declarations. If such inscriptions have been publicly exhibited and may therefore be presumed to have been well known to the members of the family, such publicity will supply any defects in the proof that they were declarations of deceased members of the family, and render them admissible on the ground of common and tacit consent.⁸ The competency of this kind of evidence rests upon the presumption that the relatives of a family would not suffer an erroneous inscription to remain upon a tombstone and that a person would not knowingly wear a ring which bore a false statement upon it.⁹

§ 26. **Evidence of Inscription, etc.**—The value of this kind of evidence depends much on the authority under which it is made; especially is this true in the case of mural and other funeral inscriptions; their existence is proved by copies or other

¹ 1 Greenleaf on Evidence, § 105; 2 Taylor on Evidence, 574; *Monkton v. Atty. Gen.*, 2 Russ. & M. 163; *Goodright v. Moss*, 2 Camp. 594.

² 2 Taylor on Evidence, 574; *Rokeby Peer.*, Pr. Min. 4; *Lovat Peer.*, Pr. Min. 77; *Chandos Peer.*, Pr. Min. 10.

³ *Slaney v. Wade*, 1 Myl. & C. 338; 1 Greenleaf on Evidence, § 105.

⁴ 2 Taylor on Evidence, 574; *Comuys Peer.*, 6 Cl. & Fin. 801.

⁵ *Vowles v. Young*, 13 Ves. 144; 1 Greenleaf on Evidence, § 105.

⁶ *Hungate v. Gascoigne*, 2 Coop. 414, 416.

⁷ *Goodright v. Moss*, 2 Cowp. 594; *Monkton v. Atty. Gen.*, 2 Russ. & M. 163; 2 Taylor on Evidence, 574.

⁸ 1 Greenleaf on Evidence, § 105; 2 Taylor on Evidence, 574; *Monkton v. Atty. Gen.*, 2 Russ. & M. 163.

“The ground upon which an inscription on a tombstone or tablet in a church is admitted is that it is presumed to have been put there by a member of the family cognizant of the fact and whose declaration would be evidence; where a pedigree hung up in the family mansion is received it is on the ground of its recognition by the members of the family.” *Baron Parke in Davies v. Lowndes*, 7 Scott N. R. 193.

Some remarkable misstatements on monuments are given in 1 Phillipp's on Evidence, 222, and notes.

⁹ 1 Greenleaf on Evidence, § 105; 2 Taylor on Evidence, 575; *Vowles v. Young*, 13 Ves. 144.

secondary evidence. Parol testimony of their contents offered on the ground that the original monuments are destroyed or effaced is not generally admissible unless the prior existence of the monuments and the genuineness of the inscriptions are established in the strongest manner that the circumstances of the case will admit. The ease with which evidence of this nature can be manufactured and the difficulty of disproving it show the necessity of enforcing this rule with more than ordinary strictness.¹

§ 27. **Judgment—Finding as to Heirs in one State Not Evidence in Another.**—The general rule of law seems to be that a judgment of a court of one State declaring who are the heirs of a deceased person and that they are entitled to inherit his real estate is not *res adjudicata* and as such admissible in evidence against a stranger in the courts of another State as proof of death or of the inheritance of lands in such State.² There is no recognized principle of the law of evidence to which the admissibility of this evidence can be referred unless it is considered that the determination of the court was an adjudication of the facts of the death and heirship of such a nature as to conclude persons not parties to the proceedings in contests relating solely to lands in another State. The rule seems to rest upon the principle that the judgment is only *res adjudicata* as to the death of the ancestor between the parties to the suit or proceeding and that no court has the power to adjudicate upon the question as to who shall inherit real property in another State. This rule seems to be in harmony with the familiar principles of the law relating to judgments *in rem*. Broom in his work on Legal Maxims expresses the law thus: "A judgment *in rem* renders the thing adjudicated upon *ipso facto*, as it is thereby declared to be, and is therefore of effect as to all persons. Thus a grant of probate or of administration is in the nature of a decree *in rem* and actually invests the executor or administrator with the character which it

¹ Greenleaf on Evidence, § 105; 2 Carroll, 60 N. Y. 121; English v. Mur-Taylor on Evidence, 575; Tracy Peer., ray, 13 Tex. 366; Kearney v. Denn, 82 10 Cl. & Fin. 154, 181, 189, 192. U. S. (15 Wall.) 51; Bogardus v.

² Morin v. St. Paul, etc. Ry. Co., 33 Clarke, 1 Edw. Ch. (N. Y.) 266; 4 Minn. 176; 22 N. W. Rep. 251 (1885); Paige (N. Y.) 623; Executors v. Mur-Thompson v. Donaldson, 3 Esp. 63; 2 dock, 4 McCord (S. C.) 217; Day v. Phil. Ev. 93; Mutual, etc. Co. v. Tis-Floyd, 130 Mass. 488. dale, 91 U. S. (1 Otto) 238; Carroll v.

declares belongs to him, and so it is conclusive as against all the world." Broom's Legal Maxims, 954. But such a grant of probate or of administration is not even *prima facie* evidence of the death of the person upon whose estate it is made, in a proceeding not connected with the administration.¹

§ 28. **Marriage, Birth and Death.**—The term pedigree embraces not only descent and relationship but also matters of birth, marriage and death, and the dates of the occurrence of these events. These matters may be proved in the same manner in all cases when they occur incidentally² and in relation to a pedigree.

An entry made by a man-midwife in a book of having delivered a woman of a child on a certain day, referring to his ledger, in which he made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterward suffering a recovery. *Higham v. Ridgway*, 10 East, 109.

An official registry of marriages kept in a church by the clergyman ministering there, or, in case no such registry is kept, a private memorandum, in which the minister, in the ordinary course of his business, has entered, or intended to enter, as it occurred, each marriage celebrated by him, seems to be admissible on a question whether such minister ever did or did not celebrate a particular marriage. *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175.

§ 29. **Proof of Marriage and Birth.**—The marriage of parties and the birth of their offspring may be proved, like any other fact, by the direct evidence of witnesses who were present at the nuptials or birth. And in respect to marriage for the purpose of establishing pedigree, the same may be proved by cohabitation as husband and wife, reputation, and the like. The acts and declarations of a man and woman, and other attending circumstances during their cohabitation together, being a part of the *res gestæ*, are proper evidence to show the character of their intercourse, whether it was matrimonial or meretricious.³

¹ *Morin v. St. Paul, etc., Ry. Co.*, 33 Minn. 176; 22 N. W. Rep. 251 (1885) and cases before cited. It seems to be held otherwise in some States. *Tisdale v. Conn., etc., Ins. Co.*, 26 Iowa, 170; *Jeffers v. Radcliff*, 10 N. H. 242. The law of England seems to be as stated in the text. *Jeffers v. Radcliff*, 10 N. H. 242.

² *Greenleaf on Evidence*, § 104; *Anderson v. Parker*, 6 Calif. 197; *Morrill v. Foster*, 33 N. H. 379.

³ Reputation has been held good evidence of a marriage, in an ejectment brought by an heir, though his parents, whose marriage was the subject in dispute, were both living. *Doe v. Fleming*, 4 Bing. 266; *Harman v. Harman*, 16 Ill. 85; *Henderson v. Cargill*, 31 Miss. 367; *Ford v. Ford*, 4 Ala. 142; *Thorndell v. Morrison*, 25 Penn. 326; *Kenyon v. Ashbridge*, 35 Ib. 157; In the matter of *Taylor*, 9 Paige Ch. (N. Y.) 611;

But, although the parties cohabit together, and, as regards society, hold themselves out as husband and wife, and other facts indicative of wedlock have been sworn to by witnesses, a court or jury may find that the cohabitation was illicit, and that no valid marriage had taken place.¹

Still, the general and ordinary presumption of the law is in favor of innocence, in questions of marriage and legitimacy, where children are concerned. Cohabitation is presumed to be lawful until the contrary appears, and moreover in cases of conflicting presumptions on the subject of marriage and legitimacy, that in favor of innocence must prevail.²

§ 30. **Hearsay Evidence Not Competent, When.**—Hearsay evidence is not admissible to prove the place of any particular birth, marriage or death; for that is a question of locality only, and does not fall within the principle of the rules applicable to cases of pedigree. By the general rule all evidence must be given on oath, so that the adverse party may have the option of cross-examining the witness. The only established exceptions where hearsay evidence is admitted are in cases of prescription, custom and pedigree; and these are founded upon necessity; for if reputation in respect of the two first, and the declarations of the family as to the other, were not admitted, all probable evidence of these facts would be excluded. But as reputation is no evidence of a particular fact, so neither can any particular or collateral fact on a question of pedigree, such as place of birth of a child, be proved by the hearsay declaration of the family; for this goes beyond the exception established, which is merely as to tracing the descent. Where the point turns on a single fact, involving no question but of locality, it is to be proved as other facts generally are proved, according to the ordinary course of the common law; that is, by evidence to which the objection of hearsay does not apply.³

Rose v. Clark, 8 Ib. 574; Kahl v. ² Physick's Appeal, 4 Am. Law Kraner, 7 B. Mon. (Ky.) 130; Jenkins Reg. N. S. 418, 424; Sensor v. Bower, v. Bisbee, 1 Edwards' Ch. (N. Y.) 377; 1 Penn. 450; Hill v. Hill's Admrs., Tilts v. Foster, Taylor (N. C.) 121; 32 Ib. 511; Starr v. Peck, 1 Hill (N. Evans v. Morgan, 2 Crompt. & J. 453. Y.) 270.

¹ Robertson v. Crawford, 3 Beavan, ³ Adams on Ejectment, 326; King 102; 43 Eng. Ch. 101; Blackburn v. v. The Inhabitants, 8 East, 539; Crawfords, 3 Wall. (U. S.) 175. Tyler on Ejectment, 492.

The declarations of deceased neighbors, or of the intimate acquaintances, or servants of the family, are not evidence on questions of this nature; nor do the declarations of an illegitimate member of a family fall within the rule; nor is the hearsay of a relative to be admitted when the relative himself can be produced. It is also necessary, in order to entitle the declarations of a deceased relative to be admitted, that they should be made under circumstances, when the relation may be supposed without an interest, and without a bias; and, therefore, if they are made on a subject in dispute after the commencement of a suit, or after a controversy preparatory to one received, on account of the probability that they were partially drawn from the deceased, or perhaps intended by him to serve one of the contending parties. Adams on Ejectment, 326; Vowels v. Young, 13 Vez. 147, 514; Rex. v. Inhabitants, 3 T. R. 707; Weeks v. Sparke, 1 M. & S. 688; Johnson v. Lawson, 2 Bing. 90; 14 East, 330; Doe v. Barton, 2 M. & R. 28; Pendrell v. Pendrell, Stra. 294; Harrison v. Blades, 3 Campb. 457; The case of the Berkeley Peerage, 4 Campb. 401.

§ 31. **The Defendant's Evidence in Such Cases.**—The plaintiff having proved the seizin and death of his ancestor and his descent, a *prima facie* case is made out and the burden of overcoming it is cast upon the defendant. It is now in order for the defendant to show if he can, that the plaintiff's ancestor was not last seized of the lands in dispute or that he had devised the same to a stranger. That the plaintiff is not the heir; that he is a bastard, or any other circumstance which overcomes any one of the essential ingredients of the plaintiff's case.

§ 32. **Evidence of Illegitimacy.**—Illegitimacy of the plaintiff is a defense to the action of ejectment when the action is brought by a person claiming as an heir at law.

(1.) If the plaintiff claim as a lineal heir or descendant immediately, as the son of the person last seized, the defendant, if such is the fact, may show that he is not the legitimate son of the ancestor.

(2.) If the plaintiff claims as a collateral heir or descendant, that is, through other persons interposed between himself and the ancestor, the defendant, if such is the fact, may show that the plaintiff is himself, or that some one of the persons through whom he claims by descent is not a legitimate son. The illegitimacy of any one in the line of ancestors breaks the chain of title by descent and is fatal to the action.¹

§ 33. **The Subject Discussed.**—Illegitimacy may arise (1) from being born out of lawful wedlock; (2) from being born in lawful wedlock, but not the child of the mother's husband. It

¹ 2 Phillipps on Evidence, 285.

is the settled doctrine of the common law, that, on an issue as to the legitimacy of a child, it is not necessary to prove the actual marriage of the parents; but the marriage may be proved by evidence of cohabitation, reputation, and the acknowledgment of the parties. The reason for this rule is, that the law favors the presumption of morality in the intercourse between the parties, and consequently also favors the presumption of the legitimacy of the offspring—*præsumitur pro legitimatione*.¹ The doctrine is clearly settled, that although the birth of a child in wedlock raises a presumption that such child is legitimate, yet this presumption may be rebutted both by direct and presumptive evidence, and, in arriving at a conclusion upon the subject, the jury may not only take into their consideration proofs tending to show the physical impossibility of the child born in wedlock being legitimate, but they may decide the question of paternity by attending to the relative situation of the parties, their habits of life, the evidence of conduct, and of declarations connected with conduct, and to every induction which reason suggests for determining upon the probabilities of the case. When the husband and wife have had the opportunity of sexual intercourse a very strong presumption arises that it must have taken place, and that the child in question is the result; and sometimes this presumption is made conclusive by statute. If not made conclusive by the statutes of the State, the presumption may be rebutted by evidence, and it is the duty of the jury to weigh the evidence against the presumption, and to decide as, in the exercise of their judgment, either may appear to predominate.²

The mother of the child whose legitimacy is questioned is not allowed to prove the non-access of her husband during his life-time or after his death; and of course the declarations of a deceased mother are not admissible as to the fact of non-access, which she would not be allowed to prove in person. *Rex v. Luffe*, 8 East, 193; *Rex v. Kea*, 11 Ib. 132.

§ 34. **Proof of Identity.**—The identity of the lands and of the person seized is one of the essentials of the plaintiff's case where he claims title by descent. These questions are not

¹ *Clayton v. Wardell*, 5 Barb. (N. Y.) 214; *Tyler on Infancy and Coverture*, 232–235. *Case of Banbury Peerage*, 2 Selwyn's N. P. 731; *Gardner Peerage Case*, Hargr. Co. Litt. 123 b.; *Pendrel v.*

² *Phillipps on Evidence*, 288; *Tyler on Infancy and Coverture*, 232, 235; *Pendrel*, 2 Stra. 924; *Goodright v. Saul*, 4 T. R. 356.

always free from difficulty and doubt. The identity of the lands can generally be established by the usual channels of evidence. In regard to the identity of the person seized or who was named in the conveyance of the lands in dispute, it is a general rule that where the plaintiff traces his title back to a person bearing the same name as the person admitted or shown to have been seized, the presumption of law is that he has connected himself with the true source of title.¹ The rule seems to be settled that proof of identity is always admissible on the part of the plaintiff when the question is raised, leaving the defendant to show, if such is the fact, that the plaintiff is not the person intended.

A plaintiff having the name of a patentee or a grantee, or being the descendant of a person having the name of the patentee or grantee, is never required to go further than the production of the deed or patent, and connect himself with the reputed patentee or grantee, unless the presumption of identity is first repelled by the defendant. And it is not sufficient for the defendant to prove that there was another person of the same name. He must prove that he was the person to whom the grant was made; otherwise the *prima facie* evidence of the plaintiff is not repelled. Whether the question of identity relates to the lessee, or to a previous grantee, from whom the lessee derives his title, the rule is the same.²

In an early case in New York letters patent to Peter Shultz, one of the lessors of the plaintiff (it was under the old practice) in ejectment, were produced. The court held that *prima facie*, the lessor, Shultz, was the real patentee. The defendant then proved that there was another person of the same name, who was too young, during the revolutionary period, to be a soldier, and that the lessor had not been a soldier. Upon this evidence it was held that the defendant was entitled to judgment. In delivering the opinion, Spencer, J., said: "Whenever the plaintiff introduces a deed conveying the premises to a person of the name of his lessor, it is *prima facie* evidence that the lessor is the real grantee. The burden of disproving this and repelling the presumption, is thrown on the defendant, and he may prove that the deed was granted to a different person of the same name," and Thompson, C. J., said: "It was always open to a defendant in ejectment to show that the lessor was not the person intended by the patent, though he may bear the same name. *Jackson v. Goes*, 13 Johns. (N. Y.) 518.

¹ *Jackson v. Cody*, 9 Cow. (N. Y.) Johns. (N. Y.) 226; *Jackson v. Goes*, 140; *Jackson v. Hart*, 12 Johns. (N. Y.) 13 Johns. (N. Y.) 518. Y.) 77; *Jackson v. Boneham*, 15 ² *Tyler on Ejectment*, 495.

In another case the lessees of the plaintiff claimed as heirs at law to Moses Miner, and proved that their ancestor was a soldier in the New York line. The name of the soldier to whom the patent was issued was Moses Miner. In delivering the opinion the court said: "The only difficulty in the case arises from the name being spelled Minner, instead of Miner. It is evident that the soldier under whom the lessors claim wrote his name Miner; and if it had been shown that there had been in the army any man by the name of Minner, the patent would be deemed to have issued to him. But nothing of that kind appearing, it must be considered a mere mis-spelling of the name, which can not affect the identity of the person; nor is it such a difference in the spelling as to make it a distinct name." *Jackson v. Boneham*, 15 Johns. (N. Y.) 226.

Where the patent was to Patterson, who was described in the balloting book by that name, and as a revolutionary soldier, the plaintiff proved and relied on a deed from Patterson, described as such soldier in the body, but signed Petterson; and the court held that it was no material variance, and that, at any rate, it was such an ambiguity as might be explained; and that if the soldier intended by the deed was Petterson, and a man different from Patterson, it lay with the defendant to show this; and he had a right to show it. It was held that the letter *e* is often pronounced broad like *a*, and the two names, when spoken by the mass of ordinary men, in common and rapid conversation, would be pronounced alike. *Jackson v. Cody*, 9 Cow. (N. Y.) 140; see also *Jackson v. Hart*, 12 Johns. (N. Y.) 77; *Jackson v. Stanley*, 10 Ib. 133; *Franklin v. Talmadge*, 5 Ib. 84.

§ 35. When the Plaintiff Claims Title by Devise—Burden of Proof.—Where the plaintiff claims title as devisee immediately upon the death of testator, he must prove the seizin of the property in question and that the will has been duly executed according to the laws of the State where the same was made, or where the property is situated, or both; and if the devise under which he claims be of a remainder, a reversion, or a like estate, he must prove the determination of all the precedent estates, upon which determination the estate devised to him is made to vest in possession.¹

No technical words are necessary to devise a fee, and the intention of the testator, to be collected from the whole will, is to govern. *Jackson v. Babcock*, 12 Johns. (N. Y.) 389.

The testator devised as follows: "I give to my wife, after payment of debts, etc., all my estate, real and personal, that I may be in possession of at my decease, to be at her absolute disposal, according to an agreement made and entered into with her, on the 27th of October, 1802, and previous to our marriage; it being my intention, if my said wife should die before me, that my real and personal estate shall be divided among my said children, their heirs and assigns." Held, that the wife took an estate in fee, not by implication, but by force of the words "all my estate to be at her

¹ Adams on Ejectment, 330; 2 Greenleaf on Evidence, § 310; 2 Phillips on Evidence, 291.

absolute disposal"; that as, by reference to the agreement in writing mentioned in the will, it appeared that it was intended, that after the death of one, the other should have the full benefit of survivorship in the joint estate created by that agreement, it showed the intention of the testator to dispose of the fee; and the use of the word heirs in the devise to the children did not show an intention in the testator to limit the preceding devise to his wife, to her life only. *Ib.*

The words of a will were, "my property, after my debts are paid, I leave to my beloved wife, A., and wish her to educate my two daughters, J. and G.; with care, and to treat them with kindness and affection," without any personal bequest, except a ring to a third person, or other words to explain or control them; held, that the real and personal estate of the testator passed to the wife in fee. *Jackson v. Housel*, 17 Johns. (N. Y.) 281.

Where a testator, being seized in fee of several estates in the parish of C., partly paternal, and the remainder purchased at different times, devised the whole (consisting of nineteen messuages and eighteen acres of land) to his wife, in fee, and afterward levied a fine "of twelve messuages, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, and five acres of land covered with water," and died suddenly without re-executing his will; held, in ejectment by the heir at law, for the paternal estate, (on the ground that the fine operated as a revocation of the will,) that parol evidence was admissible to restrain the operation of the fine to one of the purchased estates on which were twelve messuages, so as not to pass the estate in question. *Den v. Wilford*, 8 Dowl. & Ry. 519.

§ 36. **Plaintiff Must Show a Valid Will.**—In general it is sufficient to make a *prima facie* case for the plaintiff to show seizin and death of the deviser and a valid will where the will has been proven. A valid will is shown by exemplified copies of the will and the judgment or decree and the proceedings of the court admitting it to probate.¹

§ 37. **Proof of Seizin in the Testator.**—Where the plaintiff claim title under a will, the burden of proof is upon him to show seizin in the testator and death under the same conditions and limitations as an heir at law.²

§ 38. **Possession Transferred to Plaintiff's Devisor.**—Evidence that one was in possession of the premises in dispute for more than twenty years before the commencement of the action, and that his title was transferred to the plaintiff's devisor who took possession, is sufficient to maintain the action as against one who makes no claim of title but relies solely on the failure of the plaintiff to make out a case.³

¹ 2 Greenleaf on Evidence, 239; ² 2 Greenleaf on Evidence, 289; 3 Washburn on Real Property, 431; Adams on Ejectment, §29.

Shephard v. Carriel, 19 Ill. 313; ³ *Johnson v. Johnson*, 70 Mich. 65; *Gardner v. Ladue*, 47 Ill. 211. 37 N. W. Rep. 712 (1888).

§ 39. **Claims of Ownership—Actions Speak as Well as Words.**—Where a person goes into possession of land under a deed purporting to convey to him a title in fee simple, improves the same, and continues to occupy the same up to his death, and in his will claims the land as his home place, a part of which he devises to his wife for life, proof of these facts by the wife in an action of ejectment by her, is sufficient evidence of title to authorize a recovery. The claim of title need not necessarily be expressed in words. It may be shown by acts.¹

§ 40. **The Law of the Place Governs.**—Wills of real property are governed by the law of the place where the property is locally situated as to all questions relating to the capacity of the testator, the extent of his power to dispose of the property and the forms and solemnities necessary to give the will its due attestation and effect.² Hence it is incumbent on the plaintiff to show the due execution of the will according to the peculiar laws of the State where the premises are situated.

The law of the place where the land is situated governs in the matter of the forms and solemnities requisite to give effect to a will designed to operate upon the same, though in a majority of the States, as in Massachusetts, a will made according to the forms of the other State where the testator dwells may be admitted to probate in the State where the land is situated. 3 Washburn on Real Property. 430; Story's Conflict of Laws, § 474; U. S. v. Crosby, 7 Cranch (U. S.), 115.

Wills to pass land must be executed and authenticated according to the laws of the country where the land lies. Robertson v. Barbour, 6 Mon. (Ky.) 527.

Proof of the execution of a will made in a Spanish province, according to the laws of that country, not conformable to the laws of Virginia, is not sufficient to pass lands then situate in Virginia. Ib.

§ 41. **Probate of Wills—The General Practice.**—Under the English law wills were proved in the Ecclesiastical Court. But in the United States they are proved in courts having jurisdiction over the settlement of the estates of deceased persons, usually called Probate Courts, though in some States known by other names. The most general practice is upon a hearing in court upon notice to all parties interested. Under the common law the Ecclesiastical Courts had no jurisdiction of matters concerning real property, and therefore the probate

¹De Witt v. Bradbury, 94 Ill. 446 Story on Conflict of Laws, § 474; 1 (1880). Jarman on Wills, 1, 2; 4 Kent's Com.

²2 Greenleaf on Evidence, 585; 513.

of a will, as far as the real property was concerned, gave no validity to the will. But in most of the United States the probate of the will has the same effect in the case of real estate as in that of personal property. The general practice is to deposit the original will in the office of the clerk of the court, and deliver to the executor a copy, together with an exemplification of the judgment of probate.¹

§ 42. **Decrees Admitting Wills to Probate Binding.**—The jurisdiction of the Probate Court being exclusive in regard to all matters pertaining to the settlement of the estates of deceased persons, the decrees of such courts upon the probate of wills are absolutely unimpeachable and conclusive in all other courts both in law and equity.² In all cases where the court has jurisdiction, its decree is the proper evidence of the probate of the will, and is proved in the same manner as the decrees and judgments of other courts.³

§ 43. **Judgment of Probate Court Conclusive upon All Persons.**—The term “parties” in proceedings *in personam* in general includes all persons who are interested directly in the subject of the controversy and have the right to make a defense, etc. Persons not having this right are regarded as strangers to the cause of action.⁴ In these proceedings all persons who are made parties and notified are bound by the judgment, and so are all persons who are represented by the parties and claim under them or in privity with them. But the action of a court in admitting a will to probate is usually termed a proceeding *in rem* and the judgment is binding and conclusive, not only upon the parties actually litigating in the proceeding, but upon all others, and is evidence of the facts adjudicated against all the world. This principle rests partly upon the ground rule that every person who can possibly be affected by the decision has a right to appear and assert his rights by becoming a party to the proceedings, and partly upon the more general ground of public policy and convenience, it being essential to the peace of society, that questions of this kind should not be left doubtful, but that domestic and social rela-

¹ 1 Greenleaf on Evidence, § 518; Chase v. Hathaway, 14 Mass. 222. ² 1 Greenleaf on Evidence, § 518; Chase v. Hathaway, 14 Mass. 222;

³ 3 Redfield on Wills, 56; Griffiths v. Farnsworth v. Briggs, 6 N. H. 561. ⁴ Greenleaf on Evidence, § 523.
Hamilton, 12 Ves. 298; Allen v. Dundas, 3 T. R. 125.

tions of every member of the community should be clearly defined, conclusively settled and forever at rest.¹

§ 44. **Proof of Title Under Foreign Wills.**—Under the English common law, where a party to an action of ejectment claimed title under a will, he was required to produce the original will in court. It was not conclusive upon the opposite party, and he might attack it by showing that it was a mere fabrication and forgery, or that the testator was incompetent to make a will by reason of his being under lawful age, or some legal restraint or decree, or from mental incapacity, whether proceeding from idiocy, lunacy or the like.²

The difficulty of producing the original will has been obviated in nearly all, if not all, of the American States by statutory enactments, providing for the use of exemplified copies of the will, and proceedings of the court admitting the same to probate.

As an illustration of these enactments we quote the statute of Illinois:

"All wills, testaments and codicils, or authenticated copies thereof, proven according to the laws of any of the United States or the Territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this State, accompanied with a certificate of the proper office or offices that said will, testament, codicil or copy thereof was duly executed and proved agreeably to the laws and usages of that State or county in which the same was executed, shall be recorded as aforesaid, and shall be good and available in like manner as wills made and executed in this State."³

By these statutory enactments the plaintiff must be guided in making up his chain of title.

An application of the statute.

William Shephard brought an action of ejectment against Henry K. Carriel in the St. Clair Circuit for the recovery of the possession in fee of the northwest quarter of the southeast quarter of section twenty-four, township two north, of range six west, in St. Clair county, Illinois. To make up his chain of title, starting from the government as the source, he offered in evidence without objection a patent from the United States to Archibald William Yard Lampkin, bearing date January 1, 1840, for the tract of land in controversy.

It was admitted that Lampkin was dead, and that Pamela Lampkin was his only heir-at-law.

¹ Greenleaf on Evidence, § 525; Ennis et al. v. Smith et al., 14 How. (U. S.) 400.

² 2 Phillipps on Evidence, 292.

³ R. S. Ill., 1845, 538, § 8; S. & C. Statutes Ill. 2471, § 9.

The plaintiff then offered the last will and testament of the said Pamela Lampkin, which contained certain specific devises and the following clause, to wit:

Third: I nominate and appoint James Harper, Robert C. Skidmore and Elias Philipps, executors of this, my last will and testament, and I authorize and empower my said executors, or such of them as may qualify, to sell and convey all or any part of my real estate, at public or private sale.

PAMELIA LAMPKIN. [L. S.]

Said will was attested as follows:

Signed, sealed, published and delivered by the testatrix, as and for her last will and testament, in our presence, who, at her request, and in her presence, and in the presence of each other, have hereunto subscribed our names and places of residence, as witnesses thereto, this 26th day of March, A. D. 1845.

Chas. G. Harens, No. 55 Amos St., New York; Jno. Geo. Bolen, No. 190 Church St., New York; Catherine S. Bolen, No. 190 Church St., New York; Sidney Morgan, Staten Island, New York.

To which will was attached the proceedings of the Surrogate's Court, held in and for the county of New York, at the surrogate's office in the city of New York, on the first day of July, 1845.

Present—Charles McVean, Esquire, Surrogate.

Wherein, after reciting the process upon which the persons interested were notified of the intention to prove said will of Pamela Lampkin, deceased, and copying said will, the following order was entered, viz.:

In the matter of proving the last will and testament of Pamela Lampkin, deceased.

COUNTY OF NEW YORK, ss.

Charles G. Havens, of the city of New York, being duly sworn and examined, before Charles McVean, surrogate of the county of New York, doth depose and say that he was well acquainted with Pamela Lampkin, now deceased; that he was present as a witness, and did see the said Pamela Lampkin subscribe her name to the instrument in writing, now produced and shown to deponent, purporting to be the last will and testament of said deceased, bearing date the twenty-sixth day of March, one thousand eight hundred and forty-five; that such subscription was made by the said testatrix in the presence of this deponent; that the said testatrix, at the same time, declared the instrument so subscribed by her, to be her last will and testament. Whereupon this deponent signed his name as a witness, at the end thereof, in the presence of and at the request of said testatrix, and that the said testatrix, at the time of executing and publishing the said last will and testament, was of full age, and of sound mind and memory, and not under any restraint, and was, in all respects, competent to devise real estate. And deponent further says, that he saw John G. Bolen, Catharine A. Bolen and Sidney Morgan, sign said will as witnesses, in the presence of and at the request of said testatrix.

C. C. HAVENS.

Sworn this first day of July, 1845, before me.

CHARLES MCVEAN.

A similar affidavit of John Geo. Bolen, made on the same day as the

former, and before the same person, is also attached to said will. And then follows the following order, viz.:

COUNTY OF NEW YORK, ss.

Recorded the preceding last will and testament of Pamela Lampkin, deceased, as a will of real and personal estate, together with the proofs, examinations and other proceedings, taken and had in the court of the surrogate of the county of New York, relating to the proving of said last will and testament, which record is signed and certified by me, pursuant to the provisions of the Revised Statutes, this first day of July, in the year of our Lord, one thousand eight hundred and forty-five.

CHARLES McVEAN.

The People of the State of New York, by the grace of God, free and independent, to all to whom these presents shall come or may concern, send greeting:

Know ye, that at the county of New York, on the first day of July, in the year of our Lord one thousand eight hundred and forty-five, before Charles McVean, Esq., surrogate of our said county, the last will and testament of Pamela Lampkin, deceased, was proved, and is now approved and allowed by us, and the said Pamela Lampkin being, at or immediately previous to her death, an inhabitant of the county of New York, by reason whereof the proving and registering of said will, and the granting administration of all and singular the goods, chattels and credits of the said testatrix, and, also, the auditing, allowing the final discharging the accounts thereof, doth belong with us, the administration of all and singular the goods, chattels and credits of the deceased, and any way concerning her will, is granted unto James Harper, of the city of New York, one of the executors in the said will named, he being first duly sworn faithfully and honestly to discharge the duties of such executor, according to law. In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto annexed.

Witness, Charles McVean, Esquire, surrogate of our said county, at the city of New York, the nineteenth day of July, in the year of our Lord, one thousand eight hundred and forty-five, and of our independence the seventieth.

CHARLES McVEAN. [SEAL.]

STATE OF NEW YORK, }
County of New York. } ss.

I, Charles McVean, surrogate of the county of New York, and acting as clerk of the Surrogate Court, do hereby certify that on searching the records of the Surrogate's Court, I find that on the first day of July, one thousand eight hundred and forty-five, the last will and testament of Pamela Lampkin, late of the city of New York, deceased, was duly proved and admitted to probate and record by Charles McVean, surrogate of the county of New York, as a will of real and personal estate, according to the laws of the State of New York, and that letters testamentary thereon were, on the nineteenth day of the same month, granted to James Harper, of the City of New York, one of the executors named in said will, in due form, he being the only one who was qualified and taken upon himself the execution thereof.

And I further certify that I have compared the foregoing copy of the said last will and testament, and the letters testamentary granted thereon, with the original record thereof, now remaining in this office, and have found

the same to be a correct transcript therefrom and of the whole of such original, and that said letters have not been revoked, but remain in full force.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, this sixteenth day of November, in the year of our Lord, one thousand eight hundred and forty-seven, and of our independence the seventy-second.

[SEAL.]

CHARLES McVEAN, Surrogate.

STATE OF NEW YORK,
City and County of New York. } ss.
Surrogate Court.

I, Charles McVean, surrogate of said county and presiding magistrate of the Surrogate's Court, do hereby certify that the foregoing exemplification of the last will and testament of Pamela Lampkin, deceased, and the letters testamentary granted thereon, is authenticated in due form.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate Court, this sixteenth day of November, in the year of our Lord one thousand eight hundred and forty-seven, and of our independence the seventy-second.

[SEAL.]

CHARLES McVEAN, Surrogate.

STATE OF NEW YORK. }
City and County of New York. } ss. I, Charles McVean, surrogate of said county, do certify that by virtue of my office as surrogate, I am sole clerk and sole judge of said Surrogate's Court, and that the foregoing certificates made by me are properly made, the one in my capacity as clerk and the other as presiding magistrate of said court.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, this sixteenth day of November, in the year of our Lord one thousand eight hundred and forty-seven, and of our independence the seventy-second.

[SEAL.]

CHARLES McVEAN, Surrogate.

Indorsements made by Illinois officers.

Filed for record in St. Clair county, December 8, 1851.

Recorded in Book No. 2, page 42.

THEODORE ENGLEMAN.

Recorded in St. Clair county, Illinois, Book D, pages 284, 285 and 286, February 11, 1857.

JOHN SCHUL, Clerk.

To the admission of which the defendant objected, on the grounds that there was not sufficient evidence of the due execution and proof of the will in the State of New York, and the court sustained the objection; on an appeal to the Supreme Court, the ruling of the Circuit Court was reversed. Breese, J., said: "We are satisfied the will is sufficiently proved; the certificate of the probate in New York is conformable to our statute. (R. S. 1845, Chap. 109, § 8.) It sufficiently appears from it that the will was duly executed and proved agreeably to the laws and usages of that State. The right of the party claiming under the will arises out of the will and by the will, and when the will is probated, the proof, at the same time, is created of this right, which vested at the death of the testator, the probate not conferring the right, but being merely evidence of the right."

Judgment reversed.

Shepherd v. Carriel, 19 Ill. 313 (1857).

§ 45. **Where the Plaintiff Claims Under an Unproved Will.**—The will takes effect at the death of the testator.¹ The right of a party claiming under a will, arises out of the will and by the will, and when the will is admitted to probate the proof at the same time is created of this right, which vested at the death of the testator; the probate of the will does not confer or create the right, it is merely evidence of it.² In actions of ejectment the English common law courts did not take notice of the probate of a will by the Ecclesiastical Courts, because these courts had not jurisdiction over matters of real property, and, therefore, when the plaintiff claimed as devisee of a freehold estate, the burden of proof was upon him to establish the validity of the will by proving its execution in the usual manner in addition to the seizin and death of the devisor.³ In cases where the plaintiff relies upon a will, which from its being lost or destroyed or from some other cause has not been admitted to probate, he must, in the absence of statutory enactments to the contrary, establish its due execution and validity, according to the common law or statutory requirements of the State in which the premises in controversy are situated.

And so, in an action of ejectment, a contest over the validity of the will may arise, as it frequently did, under the English practice. Hence the burden is upon the plaintiff to show the due execution of the will, according to the requirements of the law where the property in dispute is located, and this having been done the burden is upon the defendant. He may avail himself of any legal defense against the will, the most common of which are forgery, duress, undue influence, testamentary incapacity and revocation, etc. A discussion of the law of contested wills is not within the scope of this work, but a few of the more common grounds will be mentioned.

Where the defendant's title to the land sued for, and his only defense was under a supposed will of a former owner, and it appeared that there had been a former action of ejectment against the defendant, in which the same question was in issue, and in which the said supposed will was adjudged to be invalid, and the case on that ground decided against him: *Held*, that he was not thereby concluded from going into evidence to establish the legality of the will. *Edelen v. Hardy's Lessee*, 7 Harr. & J. (Md.) 61.

¹ A will has no effect or operation, until the death of the testator, who, in the meantime, may revoke it in whole or in part. *Matter of Nan Mickel*, 14 Johns. (N. Y.) 324. ² Breese, J., in *Shephard v. Carriel*, 19 Ill. 313. ³ Starkie on Evidence, 296.

§ 46. **Revocation as a Defense.**—At common law in actions of ejectment a devise might have been defeated by showing a revocation of the will. The methods by which or the manner in which wills may be revoked, is in general a matter of statutory regulation. By the English statute of frauds it is provided that no devise in writing of lands, tenements or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burned or canceled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same.¹

The provisions of this statute have been adopted by nearly all of the American States. We quote the statute of Illinois as an illustration:

No will, testament or codicil shall be revoked otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid in due form of law.²

§ 47. **Modes of Revocation.**—The most common mode of revoking a will, is that of altering it by some other will or codicil in writing. It seems to be clearly settled, that the second will or codicil can not have the effect of revoking a former one, notwithstanding that it contained a general clause of revocation, unless it be proved to have been duly and formerly executed, according to the requirements of the law; for, being intended to be a will and to revoke as such, it must have all the solemnities and forms of a will, or it can not operate as a revocation. And further, if the second will does not expressly revoke, it revokes only so far as it appears to be clearly inconsistent with the former devise as to the particular subject-mat-

¹ Eng. Statutes of Frauds, § 6; 2 ² R. S. Ill., 1845, 540; Purple's Stat-
Phillipps on Evidence, 296. utes, 1194.

ter of that devise; for all devises remain in force unless altered by some other will, or revoked in some legal manner. Another very common mode of revocation is by burning, or canceling, tearing, or obliterating, by the testator himself, or in his presence, and by his directions and consent. These acts are in their nature equivocal, and their effect, as a revocation, must entirely depend upon the intention with which they are accompanied. A will may be canceled by mistake or by accident; but such a canceling is not a revocation. On the other hand, the burning or tearing may be partial or incomplete; yet, if done with the design of revoking the will, it will be as complete a revocation as if the entire will had been destroyed. The act, therefore, must be proved to have been done with the intention of revoking. And on a question of intention, as this is, evidence of the declarations of the testator at the time of doing the act, or of his subsequent declarations respecting the act, is clearly admissible, and has been admitted in a great variety of cases.¹

§ 48. **Mental Incapacity as a Defense.**—The mental incapacity of the testator, at the time of making the will, was a good ground of defense at common law, for unless the testator was in a state of mind competent to do such an act, the supposed will is absolutely void. The rule of law upon this subject was early laid down by Lord Coke.² It is not enough, he says, that the testator, when he makes his will, should have sufficient memory to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his lands with understanding and reason; this, he adds, is such a memory as the law calls sure and perfect.³

§ 49. **Partial Insanity as a Defense.**—Apparent sanity, on some subjects, is not conclusive proof that delusion on particular subjects, and showing itself on particular occasions, does not exist. And it seems that, in civil cases, this partial insanity, if existing at the time of an act done, invalidates that act, though it be not directly connected with it. It has been said, that where there is delusion of mind, there is insanity; as where persons believe things to exist, which exist only, or, at least in that degree exist only, in their own imagination, and of the

¹ 2 Phillipps on Evidence, 297.

² 2 Phillipps on Evidence, 292.

³ Marquis of Winchester's Case, 6 Rep. 23.

non-existence of which neither argument nor proof can convince them, and which no rational person could have believed. This delusion may sometimes exist on one or two particular subjects, though, generally, there are other concomitant circumstances; such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion, and to establish its insane character.¹

The sanity of a testator is presumed until the contrary appears; and the *onus probandi*, as to his mental incapacity, lies on the party who alleges his insanity. *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144.

But if a mental derangement has been proved, it is then incumbent on the devisee to show a lucid interval, or the sanity of the testator at the time of executing the will. *Ib.*

A testator's bequeathing among other things, an article of property which does not belong to him, is, at most, only a circumstance from which to infer a state of mind unfavorable to the making of a testament, and ought not to prevail against positive testimony, showing his competency to make a will at the time in question. *Marks v. Bryant*, 4 Hen. & Munf. (Va.) 91.

§ 50. Lucid Intervals and Burden of Proof.—If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, from whatever cause it may proceed, whether from a natural decay of intellect, from derangement, or partial insanity, it will be incumbent upon him to establish such incapacity by the clearest and most satisfactory evidence.² The burden of proof rests upon the party attempting to invalidate what, on its face, purports to be a legal act. If he succeed in proving that the testator had been affected by habitual derangement, then it is for the other party, who claims under the will, to adduce satisfactory proof, that, at the time of making the will, the testator had a lucid interval, and was restored to the use of his reason.³

§ 51. Lost Wills.—If the will is shown to have been lost, secondary evidence of its contents is still admissible, as in the case of lost deeds and other writings.* If a will having been shown to have been in existence during the lifetime of the testator can not be found after his death, the presumption is

¹ 2 Phillpotts on Evidence, 293.

White v. Wilson, 13 Ves. 87; *Attor-*

² 2 Phillpotts on Evidence, 293; *Key Gen. v. Parnter*, 3 Bro. Ch. 441. *White v. Wilson*, 13 Ves. Jun. 89.

³ 2 Greenleaf on Evidence, § 688*a*;

³ 2 Greenleaf on Evidence, § 689; *Everitt v. Everitt*, 41 Barb. (N. Y.) 1 Jarman on Wills, Ch. 3; *Ray's Medical Jurisprudence*, Ch. 14, § 230-246;

that he destroyed it with the intent of revoking it. This like other presumptions of this nature may be overcome by evidence. But if it is overcome the contents of the will can not be proved unless by the clearest and most stringent evidence.¹

An issue will be directed to try whether a will, alleged to be lost, was ever in fact made, and what were its provisions. *Brent v. Dold*, Gilm. (Va.) 211.

§ 52. **Ancient Wills Prove Themselves.**—Where a will is thirty years old, it may be read in evidence under the doctrine of ancient instruments without other proof than that which entitles an ancient deed to be read in evidence. But the rule as to when the thirty years commences is not uniform. In the United States the period commences at the death of the testator; while in England it commences from the date of the will.²

The mere efflux of time will not authorize a will of thirty years' standing to be given in evidence without proof. There must have been possession under it, and such possession must be for the full term of thirty years, if not to the time of the commencement of the action. *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Rancliff v. Parker*, 6 Dow. 202; *see ancient deeds*.

§ 53. **Where the Plaintiff Claims as Devisee of a Leasehold Estate.**—When the plaintiff claims as legatee of a term of years, the burden of proof is upon him to show the probate of the will, for the estate is a chattel real, and the probate of the will is necessary by the common law to vest the title, and he must show the assent of the executor, for chattels real go, by law, to him.³

The assent of the executor may be shown by his allowing the legatee to receive the rents, or applying them to his use, or any other slight evidence of assent on the part of the executor, such as on the part of the tenant would amount to an attorn-

¹ *Davis v. Sigourney*, 8 Met. (Mass.) P. 402; 2 Man. & R. 195; *Staring v. 487*; *Betts v. Jackson*, 6 Wend. (N. Y.) Bowen, 6 Barb. (N. Y.) 109; *Fetherly* 173; *Steele v. Price*, 5 B. Mon. (Ky.) v. Waggoner, 11 Wend. (N. Y.) 599; 58; 2 *Greenleaf on Evidence*, § 688a. *Jackson v. Cristman*, 4 Wend. (N.

² *Adams on Ejectment*, 259; 2 Y.) 277; *Jackson v. Blanshan*, 3 *Greenleaf on Evidence*, § 310; *Jackson v. Van Deusen*, 11 Wend. (N. Y.) *Johns*. (N. Y.) 292; *McKenire v. Fraser*, 9 Ves. 5; *Jackson v. Laroway*, 3 John. Cas. (N. Y.) 277.

(N. Y.) 178; *Thaller v. Brand*, 6 Binn. ³ Since a lease for years is a chattel interest, and vests in the personal representative of the lessee, the claimant must produce the probate (Pa.) 435, 439, 444, 447; *Croughton v. Black*, 12 Mees. & W. 205; *Doe v. Walley*, 8 Barn. & C. 22; 2 Carr. &

ment will be sufficient, and such assent once given is irrevocable.¹

A chattel real having been specifically bequeathed, the death of the testator vests in the legatee an inchoate title, which is perfected when the debts are paid, and the executor assents to the delivery of the property, and, on the title thus perfected, the legatee can recover in ejectment, though the property has not been included in the inventory returned by the executor, nor distributed to the legatee by order of the Orphans' Court. *Matthews v. Turner*, 64 Md. 109; 21 Atl. Rep. 224 (1891).

§ 54. **The Consent of the Executor.**—This previous assent is made necessary for the security of the executor, upon whom all personal property devolves, in trust to apply it, in the first instance, to the payment of debts; and, until his assent is given, the legatee has only an inchoate property, and can not enter upon the premises without being guilty of a trespass. But as this assent to a legacy is only requisite for the security of the executor, and to complete the title of the legatee, there is no specific form prescribed for declaring the assent. In general, any expression or act done by the executor, which shows his concurrence or agreement to the bequest, will be sufficient;² and “a very small matter shall amount to an assent to a legacy, an assent being but a rightful act.”³ This assent, when once given, whether before probate or after, is evidence of assets, and an admission by the executor that the fund is adequate to the discharge of debts; it vests the interest at law absolutely and irrevocably in the legatee, from the death of the testator;⁴ though he may still be liable to refund in a court of equity on the deficiency of other assets.⁵

The rule in Starkie.

The devisee of a leasehold must prove (1) the lease to the deviser, (2) the will by the probate and the identity of the devisee, and (3) assent of the executor.

(1.) An admission by the defendant of the testator's interest will supersede the necessity of proving the lease.

of the will, or give other legal evidence of the will having been proved in the Ecclesiastical Court, to which court alone the jurisdiction belongs, for a court of common law will not take notice of a will, as a title to personal property, till it is proved in the Ecclesiastical Court. *Stone v. Forsyth*, 2 Doug. 707; 2 Phillpotts on Evidence, 300.

¹ 2 Greenleaf on Evidence, § 314; 1 Roper on Legacies, 250.

² 3 Bac. Abr. 84; 4 Bac. Abr. 444; Toller's Law of Executors, 308; 3 East, 124; *Duppa v. Mayo*, 1 Saund. 278 f.

³ *Noel v. Robinson*, 1 Vern. 94.

⁴ *Doe v. Guy*, 3 East, 120; *Saunders's Case*, 5 Rep. 12 b.

⁵ 2 Greenleaf on Evidence, § 314; 2 Phillpotts on Evidence, 301.

(2.) The will must be proved in order to show the devise of the chattel real, and this must be done by means of the probate, the only evidence of such a title to personal property recognized by courts of law.

(3.) Inasmuch as the legal title to the personal estate vests in the executor, even where it has been specifically bequeathed by the will, and does not vest in the legatee until the executor has assented to it, proof of such assent must be given. It is sufficient to prove that it was given either before or after probate. The legal interest vests in the legatee irrevocably by the executor's assent. No particular form is necessary. A general assent is sufficient. So is a letter by which the plaintiff promises to give possession at a particular time. It seems that an assent is not to be *implied* from the sufficiency of the assets; but an express assent will vest a term in the legatee from the death of the testator. 2 Starkie on Evidence, 296; Stone v. Forsyth, Doug. 681; 1 Inst. 111 a; Young v. Holmes, Stra. 70; Doe v. Steel, 3 Camp. C. 115; Doe v. Guy, 3 East, 120; 4 Rep. 28; Paramour v. Yardley, Flow, 539; Young v. Holmes, 1 Str. 70; and per Ld. Ellenborough, Doe v. Guy, 3 East, 123. In case of a deficiency of assets, a court of equity would interfere, and cause the legatee to refund a proportional part. Duppa v. Mayo, 1 Saund. 278; Doe v. Guy, 3 East, 120; Deeks v. Strutt, 5 T. R. 690; 3 East, 124.

§ 55. **A Chattel Estate in the Testator.**—The burden of proof is upon the plaintiff when he claims as the devisee of a leasehold estate to show that his devisor was possessed of a chattel interest and not a freehold in the premises, for, as we have seen, his possession of the premises unexplained will be presumed to be a seizin in fee. The most satisfactory evidence of this fact is the lease, but, like other facts, it may be proved by the admission of the opposite party or other competent proof.¹

The lease is the best evidence of the property being leasehold. But this may be dispensed with by proof of an admission to that effect by the defendant; as where it was proved that the defendant had admitted, in his answer to a bill in equity, that the testator, under whom the lessor of the plaintiff claimed, was possessed of the leasehold premises there mentioned. Digby v. Steel, 3 Campb. 115; 2 Phillips on Evidence, 300.

§ 56. **Where the Executor Claims the Leasehold Estate.**—Where the executor claims the leasehold estate as a chattel real the burden of proof is upon him to show the probate of the will and the grant of letters of administration or testamentary in addition to the proof of title in the testator.²

When an ejectment is brought by a personal representative, he must show his representative character by producing the probate of the will, or letters of administration, or the record of the court, wherein

¹ 2 Greenleaf on Evidence, § 314; ² 2 Greenleaf on Evidence, § 315.
Doe v. Steel, 3 Campb. 115; 2 Starkie
on Evidence, 296.

they are entered, in addition to the proof of his testator's, or intestate's, title. But minutes of the proof of the will and sealing of the probate, indorsed on the will by the surrogate and registrar of the court, will be sufficient, upon proof that, by the practice of the particular court, no other record of such grant is kept. *Adams on Ejectment*, 359; *Garret v. Lister*, 1 Lev. 25; *Elden v. Keddell*, 8 East, 187; *contra*, B. N. P. 108; *Doe v. Edwards*, 7 Ad. & Ell. 240.

§ 57. When the Plaintiff Claims in a Representative Capacity.—In all cases where the plaintiff in ejectment brings the action in a representative character, he must prove the relation which he sustains to the party for whose benefit the action is brought, as well as the other material facts necessary to be established in the action.

Where he is a guardian, he must prove the title to the lands in dispute to be in his ward, and a regular appointment, from a competent tribunal, as the guardian of his ward. If he is a testamentary guardian, appointed by the parent of the infant under the statutes of his State, he must prove the seizin of the parent, the due execution of the deed or will, and the minority of the ward at the time of the commencement of the action.¹

In ejectment, where plaintiff claims title under a deed of an administrator with the will annexed, evidence of an allotment of the widow's dower as required by the will is properly admitted to show compliance with its provisions, though the allotment does not include the land in controversy. *Orrender v. Call*, 101 N. C. 399; 7 S. E. Rep. 878 (1890).

§ 58. Under the English Law.—Guardians in common socage, and guardians appointed by deed or will, may maintain an action of ejectment to recover the property of their wards. A guardian in socage (that is, the next friend of the heir at law of one who had died seized of lands in common socage, to which next friend the inheritance can not descend,) has the wardship of the land and of the heir, until his age of fourteen years. A party, therefore, who claims as guardian in socage, will have to prove the seizin of the deceased, the fact of his leaving issue, his heir at law, under the age of fourteen years, and that among those relations to whom the inheritance can not descend, he himself is the next of blood to such issue. It seems necessary also to prove, that the ward was under the age of fourteen at the time of the demise stated in the declara-

¹ 2 Greenleaf on Evidence, § 314; Tillinghast's *Adams on Ejectment*, 255.

tion; for Littleton expressly says, that the guardian shall have wardship of the land until the age of fourteen years, and when the heir comes to the age of fourteen years complete, he may enter and oust the guardian, and occupy the land himself; however, in the opinion of others, this guardianship ends on the completion of the age of fourteen years, only where another guardian, either by the election of the infant or otherwise, is ready to succeed, and, in the mean time, the guardianship in socage will continue.¹

In the case of *Doe v. Bell*, 5 T. R. 471, where it was proved at the trial that two daughters, to whom the plaintiff claimed as guardian, in socage, were above fourteen, an objection was taken on this ground against the plaintiff's recovering. Another objection was also taken, on the ground of the insufficiency of a notice to quit. The plaintiff was nonsuited. On cause being shown against the nonsuit, the Court of K. B. discharged the rule, on the ground that the notice was insufficient; and there was no argument on the other point.

§ 59. **Personal Representatives.**—Executors and administrators may maintain the action of ejectment for chattels real of their testate or intestate, and when so suing the burden of proof is upon them to show the issue of letters testamentary or of administration and the probate of the will, in addition to the title of the testator or intestate.²

§ 60. **Executors, Trustees, etc.**—Ordinarily, an executor has no interest in the freehold, but where, by the provisions of a will, he is authorized to enter upon the land and lease or otherwise dispose of it, he has a right to maintain the action for its recovery. Where lands are devised to trustees with power to convert them into money, invest the proceeds, and receive and apply the income for the benefit of persons designated in the will, the trustees are seized of a sufficient estate to enable them to maintain the action.³ In these cases the burden of proof is upon the plaintiff to show seizin and death of the testator, the execution of the will and the issue of the letters as in other cases.

¹ 2 Phillpotts on Evidence, 303; 2 Reynold's Adm'r v. Darling, 42 Barb. Greenleaf on Evidence, § 315; Andr. (N. Y.) 418; Chew's Ex'rs v. Chew, 313; Hargr. Co. Litt. 88 b; Co. Litt. 28 Pa. St. 17; Duchane v. Goodtitle, Sec. 123. 1 Blackf. (Ind.) 117; McLean v. Mac-

² 2 Greenleaf on Evidence, § 315; 2 Starkie on Evidence, 296. donald, 2 Barb. (N. Y.) 534; Brown v. McCloud, 3 Head (Tenn.) 280; Doe

³ Kunzie v. Wixom, 39 Mich. 384; v. McFarland, 9 Cranch (U. S.) 151.

§ 61. **Corporate Existence—How Shown.**—The existence of a corporation, though it is seldom necessary to prove the same in actions of ejectment, may be shown as in other cases. In New Jersey it was held in an action of ejectment brought by the assignee of a mortgagee against a mortgagor upon a mortgage given to a corporation, it is not necessary to produce the charter of incorporation. The admission by the defendant himself in the mortgage is sufficient proof, when uncontradicted, of the existence of the corporation.¹ The general rule being that where a person treats a concern as a corporation in his business transactions with it he is estopped from denying its corporate existence.²

At the trial of a writ of entry brought by a corporation a witness testified that he was clerk of the demandant, and that two books which he produced were the records of the corporation kept by him, but these books were not otherwise offered in evidence. The demandant also put in evidence a mortgage deed of the demanded premises from a third person to itself, in which it was described as a corporation, and a subsequent deed executed by the tenant, which recited that the demandant was the holder of that mortgage, and in which he agreed to pay the mortgage debt to said corporation. It was held that there was evidence of the corporate existence of the demandant.³

§ 62. **Corporate Existence, When It Can Not be Denied.**—Where a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the government of the State and the corporation, and is no concern of third parties. When a grantee of land from a corporation by deed, which contains a condition that if he manufactures or sells intoxicating liquors, to be used as a beverage at any place of public

¹ *Dew v. Van Hunton*, 10 N. J. L. 270. *Vater v. Lewis*, 36 Ind. 288; *John v. F. & M. Bank*, 2 Blackf. (Ind.) 367;

² *Whitney v. Robinson*, 53 Wis. 309; 10 N. W. Rep. 512 (1881); *Congregational Soc. v. Perry*, 6 N. H. 164; *Topping v. Bickford*, 4 Allen (Mass.) 120; *Merchants Nat. Bk. v. Glendon Co.*, 120 Mass. 97; *Huffaker v. Nat. Bank*, 12 Bush (Ky.) 287; *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Jones v. Bank*, 8 B. Mon. (Ky.) 123; *Rector, Church Warden, etc. v. Lovett Hall Sup. Ct.* (N. Y.) 191.

³ *Provident Institution, etc. v. Burnham*, 128 Mass. 458 (1880).

resort on the premises, the title shall revert to his grantor, goes into possession of the land under the deed, he is estopped when sued by the grantor for the premises upon breach of the condition, from denying the corporate existence of his grantor or the validity of the title conveyed by its deed.¹

§ 63. **Religious Associations, etc.**—As a general rule in this country religious associations are incorporated under the statutory enactments of the State in which they are located, authorizing them to hold real estate, and the action to recover the possession of their property must be brought in the name of the corporation and not in the name of the trustees. In these cases the burden of proof is upon the plaintiff to show the incorporation of the association and the title in it of the lands sought to be recovered. In many States, however, statutes exist declaring that corporate existence need not be proved, unless it is specially desired by the defendant in his answer or plea.

Plaintiff, who was archbishop, and as such a sole corporation, took a conveyance of land to himself as an individual, which land was paid for with funds of the church. The record title remained in plaintiff as an individual for more than twenty years. A college, chapel, dormitory, etc., were erected on the land, and were used as a college and for church purposes. Plaintiff controlled and managed the property alone and expended the moneys. The corporation had no trustees, and its business was entirely in plaintiff's hands. There was no overt act changing the possession from plaintiff individually to the corporation. A decree was rendered for sale of the land for a street assessment, plaintiff not being made a party in his corporate capacity: *Held*, in an action by plaintiff in such capacity to enjoin the enforcement of the decree, the position that more than twenty years before the assessment proceedings plaintiff, as individual, had delivered possession to the corporation, which had held the land adversely and under claim of ownership, was not supported by the evidence. *Roman Catholic Archbishop of San Francisco v. Shipman*, 79 Cal. 288; 21 Pac. Rep. 830, 832 (1890).

§ 64. **Where the Plaintiff Claims Title by Execution Sale.**—Here two cases may arise, (1) where the plaintiff claims title to the lands in controversy as purchaser at a sheriff's sale made under an execution against the defendant in the ejectment or those claiming under him, and (2) when the ejectment is against a stranger. In the first instance it is sufficient to show the execution and the proceedings under it, by the sheriff's return upon it, without producing the record of the judgment. The

¹ *Cowell v. Colo. Springs Co.*, 100 U. S. (10 Otto) 55 (1879).

reason for this rule is that the sheriff's return is conclusive evidence between the parties and those in privity with them, of all the material facts recited, relating to his doing by virtue of the execution,¹ and that the defendant in the ejectment, being also the defendant in the execution, might have applied to the court to have the execution set aside if it had been issued without a valid judgment to support it, and not having done so, it will be presumed in an action against him to recover possession of the lands sold, that the judgment is valid and just.²

In the second instance a different rule prevails; where the action of ejectment is against a stranger no such presumption is indulged, and the burden is upon the plaintiff to show a valid judgment as well as a valid execution.³

A matter of precaution.

Upon this question, while the weight of English authority seems to sustain the rule as stated in the text, the American authorities are not quite uniform. As a matter of precaution the plaintiff should in every instance when it is possible to do so, fortify his case with the judgment, execution and sheriff's deed.

In an action of ejectment, brought by a purchaser under a sheriff's deed against the defendant in the execution, the defendant can not question the title. The plaintiff need show only the judgment, execution, and the sheriff's deed. The sheriff stands in the situation of the attorney of the party, appointed by law to sell and convey, and his deed stands on the same footing with the deed of the party himself. *Cooper's Lessee v. Galbraith*, 3 Wash. (U. S. C. C.) 546.

Upon the trial of an ejectment suit the court charged: "One who buys land at a sheriff's sale, sold as the property of a defendant in possession after the judgment, is not required to go back and show regular title in the defendant in *fi. fa.* All that is necessary to make out the title *prima facie* is to show a valid judgment, levy and sale, and that the defendant in *fi. fa.* had such possession as would *prima facie* show the land subject to the levy." *Heid*, proper. *McDowell v. Sutlive*, 78 Ga. 142; 2 S. E. Rep. 937 (1887).

¹ 2 Greenleaf on Evidence, § 316; Holt's Cas. 589, n.; 2 Stark. R. 199, Bott v. Burnell, 11 Mass. 163; Whitaker v. Sumner, 7 Pick. (Mass.) 551; (Md.), 172.

Lawrence v. Pond, 17 Mass. 433.

² 2 Greenleaf on Evidence, § 316. See sheriff's deeds as muniments of title. *Doe v. Murless*, 6 M. & S. 110; *Hoffman v. Pitt*, 5 Esp. 22, 23; proved, in an ejectment against the *Cooper v. Galbraith*, 3 Wash. (U. S. debtor himself, in *Doe v. Smith*, 1 C. C.) 546.

The record of a judgment, sheriff's sale thereon, sheriff's deed and mesne conveyances to the party offering them, are not evidence, where no interest in the land sold by the sheriff, is shown in the defendant in the judgment. *Arnold v. Gorr*, 1 Rawle (Pa.) 223.

A defendant whose property has been sold by the sheriff, can not defeat the purchaser in obtaining possession by connecting himself with one who may have a good title. *Ib.*

In an action of ejectment, brought by the purchaser to recover possession of land purchased by him at a sheriff's sale, it is not necessary for the plaintiff to prove a seizure of the land by the sheriff for the purpose of supporting his title. *Estep v. Weems*, 6 Gill & J. (Md.) 303.

A obtained a judgment which was void; upon which, however, execution issued, and was levied upon the land of the defendant. It was purchased by B; A afterward acquired the title by purchase: held, that he could recover in ejectment against B. *Henderson v. Overton*, 1 Yerg. (Tenn.) 394.

A judgment was rendered against A, who, on the same day, executed a conveyance of certain real estate: held, in the absence of evidence to show which act was first, that the titles were equal, and that the defendant must prevail. *Murfree's Heirs v. Cormack*, 4 Yerg. (Tenn.) 270.

§ 65. **The Rule in Adams on Ejectment.**—When an ejectment is brought by a tenant by *elegit*, and the debtor is himself in possession of the land, the only evidence necessary is an examined copy of the judgment roll, containing the award of the *elegit* and return of the inquisition. But if the possession is in a third person, the lessor must either show that such third person came into possession under the debtor, and that his right to the possession has ceased, or should the party in possession hold adversely to the debtor, be prepared with evidence of his debtor's title;¹ when the ejectment is to recover lands taken in execution, under a writ of *feri facias*, on a judgment obtained against a termor, if the party in the original action, in which the execution issues, is the claimant, the judgment must be proved.² But the writ alone is a sufficient title to the vendee of the sheriff.³ And where an assignment of a lease by deed taken in execution, was made by the under-sheriff in the name, and under the seal of office of the sheriff, it was held unnecessary to prove his authority.⁴

The *feri facias* is the uniform process to sell lands to make the money awarded by judgment in this country, and the *elegit* is generally abandoned.

¹ Adams on Ejectment, 353.

⁴ Doe v. Brown, 5 B. & A. 243;

² Doe v. Smith, 2 Star. 199; Holt, Adams on Ejectment, 355; 2 Starkie on Evidence, 297; 2 Phillipps on Evidence, 304, 306.

³ Doe v. Murless, 6 M. & S. 113; Doe v. Thorn, 1 M. & S. 425.

§ 66. **The Burden of Proof.**—In cases where the plaintiff bases his title upon a sheriff's deed under a sale upon execution, the burden of proof is upon him to show a valid judgment, execution and sheriff's deed.¹

The proof must establish a valid judgment and execution, the sale of the land by virtue of the execution, and a valid deed by the sheriff to the purchaser, in order to entitle the claimant to recover in the action of ejectment, either against the defendant in the execution or any one else in possession, and the rule is the same in several of the States. *Jackson v. Hasbrouck*, 12 Johns. (N. Y.) 218; *Townshend v. Wesson*, 4 Duer (N. Y.), 342; *Fenwick v. Floyd*, 1 Har. & G. (Md.) 172; *Den v. Morse*, 7 Halst. (N. J.) 331.

The title of a purchaser under a sheriff's sale of lands on execution, before a deed is executed by the sheriff, is held not sufficient to maintain the action of ejectment. The title accrues from the sheriff's deed. It commences with the sale, but is not perfected until a deed is executed; and though he has certain rights given him by the statutes of the State as to rent from the time of sale and to the possession in a summary way, the legal title is not in the purchaser until a deed is executed. *Doe v. Roe*, 1 Harr. (Del.) 464.

A plaintiff in ejectment is required, in the first instance, only to show a legal title, and a right of entry under it, in order to drive the defendant to the exhibition of a paramount title. And it was declared in the same case that a purchaser at a sheriff's sale has only to show his deed, the execution under which the land was sold, and prove title in the defendant in execution, or possession since the rendition of the judgment, and that the *onus probandi* is cast on the opposite party. *Hartley v. Farrell*, 9 Fla. 874; *Whately v. Newson*, 10 Ga. 74.

A sheriff's certificate of the sale of real estate upon an execution issued to enforce a lien under the mechanic's lien law of 1842 is not sufficient to enable the purchaser to maintain ejectment for the premises. He must wait until the expiration of twenty-seven months after the sale, and then procure his deed from the sheriff, when he will be in a situation to seek possession of the premises purchased. *Dean v. Pyncheon*, 3 Chand. (Wis.) 9.

A sheriff's deed is held to be evidence, under the statute, of the facts recited in it; but if such deed fail to recite all the facts required by the statute, as where it fails to recite the judgment under which the property was sold, it can furnish no evidence of the existence of such facts; and a party claiming under the deed must prove them *aliunde* in order to sustain his title in an action of ejectment. *Jordan v. Bradshaw*, 17 Ark. 106; *Newton v. The State Bank*, 14 Ark. 10; *Massey v. Gardenhire*, 12 Ark. 638.

§ 67. **Proof of a Seizin upon Which the Judgment Attached.**—Another essential of the plaintiff's case is a seizin of the lands in dispute, upon which the judgment attached. Where the defendant in the execution is in possession, it is, of itself, sufficient evidence of a legal title. He can not show title

¹ See *Muniments of Title*, Chapter XIV.

in another, for the plaintiff comes into exactly such estate as the debtor had; and if it was a tenancy, the plaintiff will be a tenant also, and estopped in a suit by the landlord from disputing his right, in the same manner as the original tenant. If the defendant in the execution was not in possession of the land at the time the lien of the judgment attached, the plaintiff must show, as against the party in possession, that the party against whom the judgment was rendered had some right, title or interest in the premises sold, and of such a nature as would be the subject of the judgment lien.¹

Where a sheriff levies upon and sells land as the property of a party who has, in fact, no interest, but only lives upon it with the real owner, a joint action of trespass to try titles will not lie by the purchaser against the party as whose property the land was sold, and the real owner. The sheriff's deed is no estoppel as against the real owner, and does not, in a joint action, operate as an estoppel against the party as whose property the land was sold. *Bruskett v. Holsonback*, 2 Rich. (S. C.) 624.

In an action of ejectment, witness was asked the question: "Who was in possession of the land?" The question was objected to upon the ground that possession was a mixed question of law and fact: *Held*, that the question was a proper one, as the opposing party, by cross-examination, could bring out the facts constituting the possession. *Fisher v. Bennehoff*, 121 Ill. 426; 13 N. E. Rep. 150 (1887).

§ 68. **The Defendant's Possession.**—It is also an essential element of the plaintiff's case, when, as a purchaser at an execution sale, he claims title under the sheriff's deed, and brings his action against the execution debtor, to show that the defendant (the execution debtor) was in the possession of the land at the date of the levy and sale. The rule of law that a purchaser at an execution sale in an action of ejectment against the execution debtor, who is shown to have been in possession at the time of the levy and sale, need not go beyond the sheriff's deed and the judgment upon which it is founded, embraces also the tenant of such execution debtor, who may be the defendant in ejectment; but in such case privity in estate must be shown.²

A tax deed, not accompanied by an offer to prove the proceedings on which it is founded, is inadmissible in evidence in ejectment. *Anderson v. McCormick*, 129 Ill. 308; 21 N. E. Rep. 803.

¹ *Jackson v. Tower*, 4 Cow. (N. Y.) 543; *Hamilton v. Jack*, *Ib.* 81; *Kim-599*; *Jackson v. Jones*, 9 Johns. brough v. Burton, 3 Humph. (Tenn.) (N. Y.) 182; *Tyler on Ejectment*, 529. 127; *Siglar v. Malone*, *Ib.* 16.

² *Pratt v. Phillips*, 1 Sneed. (Tenn.)

§ 69. **Where the Plaintiff Claims Title Under a Sale for Taxes.**—Where the plaintiff derives his title by a deed issued in proceedings for the sale of the lands as delinquent in the payment of taxes, the burden of proof is upon him to show that the provisions of the law under which the sale is made, have been complied with, and until this has been done the defendant can not be called upon for his defense; until then he may rely upon his possession,¹ as the title of his adversary must stand or fall by the record.

A deed of land sold for taxes can not be read in evidence, without proof that the requisites of the law, which subject the land to taxes, had been complied with. There can be no class of laws more strictly local in their character and which more directly concern real property, than laws imposing taxes on lands and subjecting the lands to sale for unpaid taxes; they not only constitute a rule of property, but their construction by the courts of the State should be followed.²

In order to make a good tax title, the party claiming under it must show the authority by which the sale was made, and all of the proceedings are to be construed strictly; and, except in those cases where the principle of the common law is modified by statute, the proceedings required by the statute must all be proved. *Tolman v. Emerson*, 4 Pick. (Mass.) 162; *Alvord v. Collier*, 20 Ib. 418; *Sutton v. Calhoun*, 14 La. An. 209; *Harrington v. Worcester*, 6 Allen (Mass.), 576; *Abell v. Cross*, 17 Iowa, 176; *Conway v. Cable*, 37 Ill. 88; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88; *Weyand v. Tipton*, 5 Serg. & R. (Penn.) 332; *Erwin v. Helme*, 13 Ib. 151; *Ballance v. Forsyth*, 13 How. (U. S.) 23; *Gaines v. Stiles*, 14 Pet. (U. S.) 322; *Holt v. Hemphill*, 3 Ohio, 232.

Where defendants claim under a tax sale, plaintiff, by producing his deed and showing possession thereunder, establishes a *prima facie* case. *Zink v. McManus*, 49 Hun, 583; 3 N. Y. Sup. 487.

§ 70. **Evidence of Tax Titles—Common Law Rules Pre-vail.**—When the statute under which the title originated, or which is in force at the time of the trial, is silent as to the mode of proving or disproving any fact involved in the contest, the common law rules of evidence must control the admissibility and effect of the testimony. It is a familiar rule, that the best attainable evidence shall be adduced by the party upon whom the burden of proof rests to establish every disputed fact.³

And so tenacious are the courts in the strict application of

¹ See Tax Deeds as Muniments of Title, Chapter XIV. ³ *Blackwell on Tax Titles*, 597.

² *Game et al. v. Stiles, etc.*, 14 Pet.

U. S.) 322 (1840).

this rule, that even where it clearly appears that the better evidence is unattainable, because of its loss or destruction, the next best evidence must be resorted to.¹

§ 71. Where the Proceedings are Reduced to Writing.—In some instances the statute law expressly requires that all of the proceedings shall be reduced to writing, and each document connected with them filed or recorded in some public office, for the benefit of all parties concerned, and makes the original, or certified or sworn copies thereof, admissible in evidence. But independent of this, the very nature of the proceeding implies the necessity of perpetuating the evidence of every part of it in writing, and forbids a resort to the memory of man for proof of any material fact connected with it. The list, valuation, levy of the tax, the authority to collect, the return of delinquents, the advertisement, registry and certificate of sale, deed, etc., all necessarily imply that they are to be in writing, and authenticated by the proper officer. It would be utterly impossible to conduct the proceedings in any other manner. The universal usage has been to reduce the proceedings to writing, and the authorities, either expressly or by implication, acknowledge the necessity of it.²

§ 72. Proofs by the Originals.—Where the proceedings are in the same court where the record sought to be used in evidence has been made, the original, of course, may be produced and read in evidence,³ but when the litigation is pending in another court, proof of the record must be made either by an exemplified copy or by an examined and sworn copy.⁴

§ 73. The Most Usual Mode of Proof.—The most usual mode of proving the proceeding requisite to the validity of a tax title is by means of a copy made by the officer having the legal custody of the original certificate under his hand and seal of office. But an examined and sworn copy made by a person who copied it from the original is also admissible on general principles.⁵

¹ Starkie Ev., Part 3, Sec. 10; 1 Greenl. Ev., Chap. 4, Sec. 82, 83, 84; Mariner v. Saunders, 5 Gil. (Ill.) 121.

² Job v. Tebbets, 5 Gil. (Ill.) 380; Bruen v. Graves, 11 Ill. 442.

³ 1 Greenleaf on Evidence, § 501.

⁴ 1 Greenleaf on Evidence, § 502.

⁵ Parker v. Smith, 4 Blackf. (Ind.) 70; Coman v. State, Ibid. 241; Graves v. Bruen, 1 Gil. (Ill.) 167; 11 Ill. 431; Job v. Tebbets, 5 Gil. (Ill.) 376; 11 Ill. 453; Schuyler v. Hull, Ibid. 462.

§ 74. **Loss of the Original.**—When the original records or documents are lost or destroyed, and no certified or examined copy is in existence, parol evidence of its contents may be resorted to, but the proof of the loss or destruction must be extremely clear and the contents proved to the satisfaction of the court. Such evidence ought not to be permitted when there is any suspicion of a fraudulent destruction or suppression of the original. It is extremely dangerous in any case, and the necessity of resorting to it but seldom occurs.¹

§ 75. **The Title Must Stand or Fall by the Record.**—Where the original record or a copy is offered in evidence, and it appears upon the face of either that the proceeding was irregular in any respect, parol evidence is inadmissible for the purpose of supplying the defect, or in any manner to aid it by explanation. And where the law requires the proceeding to be recorded, the title of the purchaser must stand or fall by the record itself; oral evidence being inadmissible where the officer has omitted to record the originals, or recorded them defectively.²

§ 76. **Admissibility of Books and Documents.**—In all cases where office books and files are relied upon to prove a particular fact, their admissibility depends upon the following facts: 1. That the person who made it had official authority to do so. 2. That the book or document comes from the proper depository: 3. Proof of the identity of the book or document.³

§ 77. **Duty of the Officer in Making the Transcript.**—It is well settled that a mere certificate by the officer who conducted the proceedings, or in whose custody the documents connected with them are lodged for safe keeping, stating in general terms that the proceedings were regular, or that they were conducted in conformity with the requisitions of the law, is not competent evidence to prove the performance of any prerequisite. It is the duty of the officer to make a transcript of the entire proceedings, so that the court can determine, upon

¹ Doe v. Craig, 5 Ired. (N. C.) 129; (1865); Call v. Wells, 2 Vt. 318; Kel-Proprietors, etc., v. Page, 6 N. H. 183. logg v. McLaughlin, 8 Ohio, 114; Beckman v. Bingham, 5 N. Y. 366 (1851).

² Gaines v. Stiles, 14 Pet. (U. S.) 322 (1840); Syer v. Bundy, 9 La. Ann. 540 (1854); Conway v. Cable, 37 Ill. 88 210; Doe v. Craig, 5 Ired. (N. C.) 129. ³Blackwell on Tax Titles, 600; Dikeman v. Parrish, 6 Barr (Penn.)

inspection, whether the law has been complied with or not. The officer has no power to decide upon the legality of the proceeding nor certify to his legal conclusions.¹

§ 78. **Muniments of Title.**—The question of tax titles and many of the rules of law, and necessarily some of the rules of evidence relating thereto, are discussed at some length under the head of tax deeds as muniments of title, to which the reader is referred.²

§ 79. **The Plaintiff's Evidence Where His Title Can Not be Controverted.**—We next pass to the consideration of that class of cases where the defendant is not allowed by reason of an estoppel to controvert the plaintiff's title. This class includes all those cases in which, by reason of a privity in estate existing between the parties or those under whom they hold the premises, the defendant is not permitted to deny the plaintiff's title.

In all these cases the proof is directed to the question as to whether such a relation exists between the parties so as to operate as an estoppel, and thereby supersede the necessity of introducing any evidence to establish the title of the claimant.³

§ 80. **In What Cases This Privity Exists.**—Privities of this description principally happen in three different cases: (1) Where the relation of mortgagor and mortgagee exists between the parties; (2) when that of landlord and tenant has existed; and (3) when the defendant has been admitted into possession under a void lease, or pending a treaty for a purchase, or under circumstances of a like character.⁴

§ 81. **Mortgagor and Mortgagee, Their Privies and Assigns.**—In this case an estoppel arises where the action is

¹ Blackwell on Tax Titles, 599; Rex v. Croke, 1 Cowp. 26; Gilbert v. Columbia Turnpike Co., 3 John. Ca. (N. Y.) 107; Nelson v. Pierce, 6 N. H. 194; Gaines v. Stiles, 14 Pet. (U. S.) 332; Dun v. Grimes, 1 McLean (U. S.), 319; Henry v. Tilson, 19 Vt. 447.

² Muniments of Title, Chapter XIV.

³ To the rule that a plaintiff in ejectment must recover on the strength of his own title, there are exceptions; as where a party is in possession under the plaintiff as tenant, or under contract of purchase;

in such cases the plaintiff is not required to make proof of his title. Tilghman v. Little, 13 Ill. 239. In ejectment by an heir-at-law, against a defendant who claims under a lease granted by an ancestor of the lessor of the plaintiff, if such lease, being in the hands of the lessor of the plaintiff, be produced at the trial by him, on notice, it may be given in evidence, without proof of its execution by the subscribing witness. Doe v. Hemming, 2 Carr. & P. 462.

⁴ Adams on Ejectment, 362.

between mortgagee and mortgagor, their privies or assigns. At common law, a mortgagor may bring his action to recover the mortgaged premises immediately after the mortgage becomes forfeited, and this rule of the common law is fully recognized in England and in some of the American States; and the common law governs except in those States where it has been modified by express statute. Where the lessee of the plaintiff is the mortgagee of the premises, and the mortgagee himself is the defendant, the only evidence of title required of the claimant is the due proof of his mortgage.¹

The possession of the mortgagor must be presumed in all cases to be in subordination to the title of the mortgagee until the contrary is shown; so that *prima facie* the principle of estoppel always applies in such cases. *Conner v. Whitmore*, 52 Me. 185.

§ 82. **The Law Stated by Adams.**—When the plaintiff is the mortgagee of the premises, and the mortgagor is himself the defendant, proof of the due execution of the mortgage deeds is the only evidence required. But if the ejectment be against a third person, who holds the mortgaged lands as tenant to the mortgagor, it will be also necessary to give evidence of such tenancy, and either of its regular determination, or that it was created by the mortgagor subsequently to the execution of the mortgage deed.²

§ 83. **Proof of Notice to Quit.**—In England the mortgagee is not required to show that he has given a notice to quit or demanded possession of the premises before commencing the action. In the American States the decisions upon this question are not uniform,³ and, therefore, the safer way is to give the notice and make the demand and be prepared to prove it on the trial.

§ 84. **The Grantee or Lessee of the Mortgagor.**—In cases where the action is against a grantee or lessee of the mortgagor, the plaintiff's case is made out by the production and proof of the mortgage; it must appear, however, in case the action is

¹ *Fuller v. Wadsworth*, 2 Ired. (N. Jackson v. Stackhouse, 1 Cow. 122; C.) 263; *Williams v. Bennett*, 1 Ired. Doe d. Fisher v. Giles, 5 Bing. 241; (N. C.) 122; *Lyman v. Mower*, 6 Vt. Doe v. Maisey, 2 B. & C. 767; *Keech* 345; *Wilson v. Hooper*, 13 Ib. 653; v. Hall, Doug. 21; *Thunder v. Bel-Keech v. Hall*, 1 Doug. 21; *Thunder cher*, 3 East, 449; *Birch v. Wright*, 1 T. v. Belcher, 3 East, 449; *Doe v. Giles*, R. 378; *Doe v. Trappaud*, 1 Stark. 281. 4 Bing. 421; *Partridge v. Beere*, 5 ³ *Jackson v. Longhead*, 2 Johns. Barn. & A. 604. (N. Y.) 75; *Jackson v. Green*, 4 Johns.

² *Adams on Ejectment*, 363; see also (N. Y.) 186.

against an under-lessee of the mortgagor, that the lessee was let into the possession by the mortgagor subsequently to the mortgage, and without the privity of the mortgagee. If the lessee was let into possession of the premises prior to the execution of the mortgage, then with regard to the lessee the position of the mortgagee is the same as that of the mortgagor before the execution of the mortgage. The burden of proof is upon him to show that the tenancy has been determined. But where the lessee holds possession under the mortgagor by a lease subsequent to the execution of the mortgage, or where the person in possession of the premises is a purchaser from the mortgagor, he is not entitled to notice to quit, because the relation of landlord and tenant does not exist between him and the plaintiff.¹

Where a mortgage was foreclosed by advertisement, the mortgagor in possession is not entitled to notice to quit from the purchaser at the sale, because there is no privity nor anything like the relation of landlord and tenant existing between them. *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Bennett v. Lamsen*, 7 Johns. (N. Y.) 300.

It has been held that a sale of mortgaged premises under execution at law, for a part of the mortgaged debt, by the direction or with the knowledge and consent of the mortgagor and his reception of the proceeds of the sale from the sheriff, do not discharge the lien of the mortgage, or estop the mortgagee or a subsequent purchaser at the mortgage sale, with notice of the facts, from recovering the land in an action at law. *Barker v. Bell*, 37 Ala. 354.

Where the mortgage contains a condition that the mortgagor may remain in possession until conditions broken, the burden of proof is upon the plaintiff to show the breach. *Hall v. Doe*, 5 Barn. & C. 687.

When the assignee of a mortgagee is the claimant, the proofs will bethe same as when the mortgagee is himself the plaintiff, with the additional proof of the derivative title of the assignee from the mortgagee; that is, to say the additional proof that the mortgage was duly assigned by the mortgagee to the plaintiff, before the commencement of the action. *Den v. Van Ness*, 5 Halst. (N. J.) 102.

Where a plaintiff claims to recover premises under a mortgage as forfeited, it is enough that it appear that there is a mortgage, and that from its terms the day of payment was past at the commencement of the suit. This is sufficient without proving affirmatively that the debt secured by the mortgage has not been paid. If the debt has been paid, the defendant may prove it, and that is a good defense to the action. *Rogers v. The Eagle F. Ins. Co.*, 9 Wend. (N. Y.) 611; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122.

¹ *Den v. Stockton*, 7 Halst. (N. J.) (N. Y.) 122; *Jackson v. Chase*, 2 322; *Jackson v. Fuller*, 4 Johns. (N. Y.) Johns. (N. Y.) 84. 215; *Jackson v. Stackhouse*, 1 Cow.

§ 85. **When the Defendant Holds Adversely.**—Proof of the title of the mortgagee must of course be given, if the defendant holds adversely to such title, but if it appear upon the evidence that the defendant, although not the mortgagor, is in reality defending for his benefit, he will be subject to the same rules with regard to proofs, and be estopped in the same manner from disputing the mortgagee's title as the mortgagor himself.¹

§ 86. **Ejectment by Second Mortgagee.**—When the holder of a second mortgage after a forfeiture for a default in the payment of the money secured thereby brings his action to recover possession of the mortgaged premises, he is entitled to recover on proof of his mortgage and the defendant's possession. The recovery can not be defeated by proof of the prior mortgage as an outstanding title. A defendant who has no rights either as mortgagee or assignee can not set up as a defense a mortgage that may happen to be upon the premises in dispute in favor of some third person.²

§ 87. **The Relation Existing Between Mortgagor in Possession and the Mortgagee.**—The relationship existing between a mortgagor in possession and the mortgagee is somewhat peculiar. The mortgagor in possession has been called sometimes a tenant at will to the mortgagee, or a tenant at sufferance, or like a tenant at will; but he is never designated as a tenant for any term. Lord Ellenborough called him a tenant at sufferance.³ And Lord Tenterden said: "The mortgagor is not in the situation of tenant at will, or, at all events, he is not more than tenant at sufferance, but in a peculiar character and liable to be treated as tenant or as trespasser at the option of the mortgagee."⁴ But where the mortgagee is entitled to an action of ejectment to recover possession of the mortgaged premises, he is ordinarily entitled to recover upon proving his mortgage, that the time of the payment of the money secured thereby had elapsed at the time of commencing the action, and that the defendant was then in the possession of the premises.⁵

¹ Doe v. Clifton, 4 Ad. & E. 813;

Adams on Ejectment, 363.

² Savage v. Dooley, 28 Conn. 411.

³ Thunder v. Belcher, 3 East, 449.

⁴ Doe v. Maisey, 8 Barn. & C., 767.

⁵ In some States the mortgagor is entitled to notice to quit where proof of the notice must be made before a recovery can be had.

§ 88. **The Defense of Eviction.**—The mortgagor may set up an eviction under a paramount title in bar of a recovery in an action of ejectment against him by the mortgagee, and although he has become a purchaser under the hostile title, and remains in possession of the mortgaged premises, the plaintiff can not recover.¹

But where one having a defective title mortgaged the land and continued in possession, and afterward a lease was granted to him by the real owner in pursuance of an award, the court held that the mortgagor could not set up such lease as an answer to an ejectment brought by the mortgagee. There it was decided that the usual principle of estoppel would apply. *Doe v. Vickers*, 4 Adol. & E. 782.

§ 89. **Discussion of the Doctrine Under Another Head.**—The rules of law applicable to actions of ejectment between mortgagor and mortgagee, and the questions incidentally arising therein, are discussed in the chapter on ejectment between mortgagor and mortgagee.²

§ 90. **Landlord and Tenant.**—Another instance of the application of the doctrine of estoppel in actions of ejectment, on account of the privity in estate existing between the parties, is that of landlord and tenant. When a tenancy exists it may be terminated by the efflux of time, by the occurrence of some event contemplated in the lease, by a notice to quit and demand for possession, or by a breach on the part of tenant of some condition or covenant of the lease. The action of ejectment will not lie for the recovery of the possession of the premises until the tenancy is determined in some one of these ways or otherwise.³

§ 91. **The Law Stated by Adams.**—When the relation of landlord and tenant exists between the parties, the tenancy may be determined in three several ways: (1) By the efflux of time, or the happening of a particular event; (2) by a notice from the landlord to the tenant to deliver up the possession, or *vice versa*; and (3) by a breach on the part of the

¹ When an action for the recovery of the land was brought by the people under the law of escheats against the mortgagor in possession, he gave notice of it to the mortgagee, who refused to defend. It was held that the mortgagor might confess judgment, and take title under it, and that the mortgagee could not avail himself of the usual rule of estoppel as between mortgagor and mortgagee, to sustain his action against the mortgagor in possession. *Jackson v. Marsh*, 5 Wend. (N. Y.) 441.

² Ejectment between Mortgagor and Mortgagee, Chapter V.

³ See Ejectment between Landlord and Tenant, Chapter VIII.

tenant of any condition of his tenancy, as by the non-payment of rent, or non-performance of a covenant.¹

§ 92. Plaintiff's Proofs Where the Tenancy is Determined by the Expiration of the Term.—When the tenancy is determined by the expiration of the term, if the demise is by deed, or other writing, the plaintiff has only to prove the counterpart of the lease by one of the subscribing witnesses; and it is not necessary that he should have given notice to the tenant to produce the original lease to enable him so to do. If there is no counterpart, notice to produce the original lease should be given, and then, but not otherwise, the plaintiff will be entitled, if the original lease is not produced, to give secondary evidence of its contents. If the demise is by parol, the agreement may be proved by any person present at the making of it; but if it should appear on the trial, by the witnesses on the part of the plaintiff, that a written agreement has at any time been drawn up between the lessor and the party under whom the defendant came into possession, it must be produced by the plaintiff or its absence accounted for.²

§ 93. When the Tenancy is Determined by the Occurrence of an Event, etc.—When the tenancy is determined by the occurrence of some event, the plaintiff must, in addition to the proof required in the preceding section, prove that the event upon which the tenancy is to determine has occurred.³

§ 94. When the Tenancy is Determined by Notice to Quit.—When the tenancy expires by reason of a notice to quit, the lessor must prove the tenancy of the defendant, the service of the notice and its contents, and if given by an agent, the agent's authority, and that the notice and the year of the tenancy expire at the same time. When also the notice is for a shorter period than half a year, or expires at any other period than the end of the year of the tenancy, it will be necessary to show the custom of the country where the lands lie, or an express agreement, by which such notice is authorized.⁴

§ 95. Proof of the Service of the Notice.—The service of the notice, and the authority to serve it, may be proved by the

¹ Adams on Ejectment, 366.

Eject. Appen. 458; Doe v. Oxenden,

² Adams on Ejectment, 367; Roeb.

7 M. & W. 181.

Davis, 7 East, 363; Fenn v. Griffith,

³ Adams on Ejectment, 367.

6 Bing. 533; Orrell v. Maddok, Runn.

⁴ Adams on Ejectment, 367.

person who delivered it to the tenant. The contents of the notice may be proved by a duplicate original, which should be compared with the notice actually served, by the party serving it; but if this precaution is not taken, parol evidence may be given of its contents; and it is not necessary, in either case, to give the defendant notice to produce the original in his possession.¹

§ 96. **The Tenancy Commonly Admitted.**—The tenancy of the defendant is commonly admitted, but it may be proved if necessary by declarations on the part of the tenant, the fact of payment of rent, or the like, in cases where no direct evidence can be given.²

§ 97. **Where the Tenancy is Determined by a Breach of Some Covenant in the Lease.**—Where the action is brought upon a clause of re-entry for non-payment of rent, if the proceedings are under the common law, the burden of proof is upon the plaintiff to show a lease, and that the rent has been demanded with all the formalities of the common law.³ But in many States the rule of the common law has been modified or abolished.

When the ejectment is for the breach of any other covenant, the plaintiff must show the covenant broken, by the same evidence as in an action of covenant; and if he has been ordered by the court to give to the tenant particulars of the breaches upon which he means to rely, he will be precluded from giving in evidence different breaches from those contained in the particulars. A breach of covenant by mismanagement in overcropping, and by deviating from the usual rotation of crops, has been held to be inadmissible in evidence under particulars for breaches, "by selling hay and straw off the land, removing manure, and non-cultivation."⁴

In order to show a forfeiture of an unexpired term of a leasehold estate, for non-payment of rent, the lessor must prove demand of payment of the lessee when due; and the demand must appear to have been for the precise rent due; and to have been made, where no place is named for payment, at the most public or notorious place upon the premises; if a dwelling-house be on the lands, at the front door thereof. And further, that the demand should be made on the day the rent falls due, "at a convenient

¹ Adams on Ejectment, 368; Doe v. Durnford, 2 M. & L. 62; Jory v. Orchard, 2 B. & P. 41.

² Adams on Ejectment, 368.

³ Adams on Ejectment, 370.

⁴ Adams on Ejectment, 371; Doe v. Broad, 2 M. & G. 523.

time before sunset;" by which is meant, immediately preceding sunset, and for a sufficient space of time for counting and paying the money before sunset. *Smith v. Whitbeck*, 13 Ohio St. 471; *Boyd v. Talbert*, 12 Ohio, 214.

§ 98. **Defendant's Evidence.**—In ejectment against a tenant for a forfeiture, it is a good defense that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage, although it be not shown that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant.¹

§ 99. **When the Plaintiff is Assignee of the Reversion.**—When the plaintiff is the assignee of the reversion, after proving the forfeiture, evidence must be given that he was entitled to the reversion at the time the forfeiture occurred, and if possible of the mesne assignments from the original lessor. These mesne assignments, however, will be presumed, if the original lease be for a long term, and the possession of the assignee has continued for a considerable time.²

§ 100. **The Landlord Bound by the Same Estoppels as the Tenant.**—It is a general rule of law that a person defending as landlord is bound by the same estoppels as the tenant himself, and that a party who gets possession of premises from the plaintiff, by any fraud or trick upon him, can not set up his own title, or a title in a third person, in answer to the action.³

A party, also, who defends as landlord, is estopped from objecting that the occupiers of the premises, who have suffered judgment to go by default, are tenants to the lessor, and have not received notice to quit from him. *Doe v. Creed*, 5 Bing. 327.

The plaintiff had leased the premises from year to year to a mining company, and had given to them a notice to quit on the day of the demise; he was a partner in the company, and the defendant, who was another partner in the company, defended on their behalf. The defendant was estopped from disputing the title of the plaintiff, although he had admitted, in an answer in chancery, which was in evidence, that he had no legal title to the premises. *Francis v. Doe d. Harvey*, 4 M. & W. 331.

Previous to 1812, a person built a house on a piece of waste ground, and before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held it under a lease granted in 1812. The latter let the

¹ *Adams on Ejectment*, 372; *Doe v. Lady Smythe*, 4 M. & S. 447; *Doe v. Edwards*, 5 B. & A. 1065. *Mizim*, 2 M. & R. 56; *Doe v. Litherland*, 4 Ad. & Ell. 784; *Doe v. Mills*, 2 Ad. & Ell. 17; *Doe v. Baytup*, 3 Ad. & Ell. 188.

² *Earl v. Baxter*, Blk. 1228; *Adams on Ejectment*, 373.

³ *Adams on Ejectment*, 373; *Doe v.*

premises to the defendant. It was held, in ejectment by the landlord of the adjoining land, that the defendant was estopped from denying the title of the tenant, and the tenant from disputing that of the landlord. *Doe v. Fuller*, 1 Tyr. & G. 17.

G. demised premises to D., who entered and paid rent. During the term a third party, T., disputed G.'s title, and they agreed to be bound by the opinion of a barrister, who decided in T.'s favor. G. therefore delivered up the title deeds, and permitted T.'s attorney to tell D., the tenant, that he must in future pay the rent to T. as his landlord. It was held that G.'s claim of title as landlord to D. had expired; that his conduct amounted to an admission of that fact; and that D. was not estopped from alleging it. *Downer v. Cooper*, 2 Q. B. 256.

H., having no title, was let into possession by the owner, and L. came to reside with and attend upon him. H. afterward died, having devised the premises to the lessor of the plaintiff, who continued to reside upon the premises. Upon ejectment brought, the defendants (professing to have a claim under the original proprietor) defended as landlords, but at the trial gave no evidence of title in themselves; it was held that L., having come into possession under H., the defendants were estopped from showing the circumstances under which H. entered. *Doe v. Birchmore*, 9 Ad. & E. 662.

§ 101. **Each Case Depends on Its Own Peculiar Circumstances.**—It is impossible to point out the evidence requisite in all the various cases arising under this division of the subject. Each case must depend on its own peculiar circumstances, and it is enough, therefore, to say generally, that the claimant must give evidence of the circumstances under which possession was taken, and that the defendant's right to such possession has ceased. If, for example, he was let into possession pending a negotiation for a purchase, it must be proved that he was so let into possession, and that the negotiation has been broken off. If he took possession under a void lease or agreement, the instrument must be produced and proved. If by leave and license or as tenant at will that the license has been revoked, or the will determined by demand of possession or otherwise. This general rule must be always attended to, namely, that the right of possession in the defendant must be terminated before the commencement of the action.¹

§ 102. **Defendant's Proofs in General.**—The principle that a claimant in ejectment must recover on the strength of his own title is now so clearly established that little can be said respecting the evidence necessary on the part of the defendant. The plaintiff must always, in the first instance, make out a clear and substantial title to the premises in question, and the

¹ Adams on Ejectment, 375.

defendant's evidence is altogether confined to falsifying his adversary's proofs, or rebutting the presumptions which may arise out of them. He need not show that he has himself any claim whatever to the premises, nor give evidence of a title in a third person; it is sufficient if he make it appear to the jury, that a legal title does not subsist in the plaintiff. So, when the plaintiff claims as heir, we have seen that the defendant may show, if such is the fact, a devise to another person, or that the plaintiff is not an heir, or if the plaintiff claims title by devise, where the common law rules prevail, the defendant may show that the will was obtained by fraud; that it was not duly executed; that the testator was a lunatic. And as the same principle holds, whatever be the title of the plaintiff, any particular directions respecting the defendant's proofs are altogether unnecessary. It is sufficient to observe generally, that the defendant's evidence entirely depends on the nature of the proofs advanced by the plaintiff, and need in no case to be extended beyond the rebuttal of them.¹

§ 103. **Discussion of the Doctrine Under Another Head.**

—The rules of law applicable to the action of ejectment between landlord and tenants, and the questions incidentally arising thereon are discussed in the chapter on the action between landlord and tenant.²

§ 104. **Vendor and Vendee.**—Another instance where this doctrine of estoppel is applied in actions of ejectment, is that of vendor and vendee, and when the defendant has been admitted into possession of the premises under a void lease, or pending a treaty for a purchase, or under circumstances of a similar character.

Where a person enters into possession of the land of another, with his assent, under a contract to purchase the same, the vendor may maintain ejectment against him, after default in either of the payments stipulated in the contract; and upon the trial of such action the plaintiff is only required to prove the contract of purchase, and that the defendant was in possession at the time the action was commenced.³

¹ Adams on Ejectment, 376.

(N. Y.) 576; *Hotaling v. Hotaling*, 47

² See Ejectment between Landlord and Tenant, Chapter VIII. *Ib.* 163; *Doolittle v. Eddy*, 7 *Ib.* 74; *Candee v. Haywood*, 34 *Ib.* 352.

³ *Powers v. Ingraham*, 3 *Barb.*

It has been held by the Court of Queen's Bench of England, where the defendant, being in possession of premises, entered into an agreement for the purchase of them, and the purchase not being completed, the vendor brought ejectment, that the assent was an acknowledgment by the defendant that the title was in the vendor; and, therefore, at the trial, that it was not necessary for the plaintiff to give other evidence. *Doe v. Burton*, 15 Jur. 990; 6 Eng. Law & Eq. 325.

The vendee of lands on a contract of purchase, is sometimes called quasi tenant at will; but ejectment may be maintained against such vendee upon his failure to perform his part of the contract, under which he enters without a regular notice to quit, although it would be well for the claimant to be able to show in such a case that he had given the vendee notice that the contract was at an end. *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Wright v. Moore*, 21 Ib. 230.

When one enters on land under a contract to purchase, but neglects to pay the consideration money, he and those claiming under him are estopped to question the title of the vendor, or his heirs; though more than twenty years have elapsed from the time when the last payment became due; though the vendee and those claiming under him have made permanent and valuable improvements, defended several actions of ejectment, and not been called on by the vendor to pay; and have even acquired title by conveyance from a third person. *Jackson v. Hotchkiss*, 6 Cow. (N. Y.) 401; *Brady v. Regan*, 36 Barb. (N. Y.) 533; *Jackson v. Walker*, 7 Barb. (N. Y.) 637.

§ 105. Entry Pending Negotiations for the Purchasing of Lands.—When the defendant has been let into possession of lands pending a negotiation for the purchase of the same, it is necessary in order to maintain ejectment to show that the defendant was so let into possession and that the negotiation has been broken off.¹

§ 106. Notice to Quit and Demand for Possession.—It has been argued that in such cases the plaintiff should be required to prove also a notice to quit; but it seems this is not the law. The action may be brought without the previous service of a notice to quit, unless there is a statute of the State requiring it. But as we have before said it is best in all cases, when there is any doubt as to the law, to give the customary notice to quit, and demand for possession. It is a precautionary measure to be recommended in all cases.²

§ 107. Entry Under a Void Lease.—In cases where the defendant takes possession under a void lease or agreement, in order to maintain ejectment for the possession of the premises

¹ See *Ejectment between Vendor* (N. Y.) 352; *Hotailing v. Hotailing*, and *Vendee*, Chapter VII. 47 Barb. (N. Y.) 163.

² *Candee v. Haywood*, 34 Barb.

the plaintiff must show the possession in the defendant and produce and prove the invalidity of the instrument under which he entered; for, having entered under a void lease, he becomes a tenant at will.¹

§ 108. **Entry Under a License, Revoked.**—When the defendant entered under a license, the burden of proof to maintain the action is upon the plaintiff to show the license and that the same has been revoked, and it must always appear that the right of possession in the defendant was terminated before the commencement of the action. This general rule must in all cases be borne in mind by the plaintiff in ejectment, whatever may be the relation existing between the parties, and when a privity exists between the parties, the plaintiff is not required to make proof of his title, except by the fact that such privity exists.²

§ 109. **A General Rule.**—As a general rule it may be stated that when the defendant is let into possession of premises by the owner, under circumstances by which the relationship of landlord and tenant has not been created, and the plaintiff brings his action of ejectment relying upon the principle of estoppel to relieve him from proving his title, he must give evidence of the circumstances under which possession was taken, and that the defendant's right to the possession had ceased when the action was commenced.³

One entered into an executory agreement for the conveyance of land in consideration of his maintenance during life. *Held*, in ejectment by the husband and heirs of the grantee after her death and the death of the grantor, that plaintiffs had the burden of proving payment of the consideration, they being out of possession, and that defendant should have been allowed to prove the husband's refusal to perform the contract after his wife's death, and his abandonment of the premises, and the subsequent

¹Taylor on Landlord & Tenant, § 19; Doe v. Watts, 7 T. R. 83; Digby v. Atkinson, 4 Campb. 275; Warren v. Hearnside, 2 Wils. 176.

²License as a term of real estate law is an authority to do an act or a series of acts upon the land of another without possessing any estate therein. Cook v. Stearns, 11 Mass. 533. It is distinguished from an easement, as that always implies an interest in the land (13 Am. & Eng.

Ency. Law, 541), and may be revoked at the will of the person granting it. Prince v. Case, 10 Conn. 375; 2 Am. Leading Cases, 540.

³Hotailing v. Hotailing, 47 Barb. (N. Y.) 163; Candee v. Haywood, 34 Barb. (N. Y.) 352; Jackson v. Montcrief, 5 Wend. 26; Wright v. Moore, 21 Wend. (N. Y.) 230; Doe v. Burton, 15 Jur. 990; 6 Eng. L. & E. 325; Tyler on Ejectment, 558.

agreement of defendant to provide for the grantor, and the conveyance of the premises to him in consideration thereof. *Driesbach v. Serfass*, 126 Pa. 32; 17 Atl. Rep. 513.

§ 110. **When the Defendant is Estopped from Setting up an Outstanding Title.**—A defendant can not controvert a plaintiff's title by showing a title in some third person, where he entered by the permission of the plaintiff or as an intruder upon the possession of the plaintiff without such permission, and without claim of title, or where the plaintiff claims under a judgment and execution against the defendant. In these cases he is estopped from setting up an outstanding title.¹

§ 111. **Where the Defendant is a Mere Possessor.**—Although the defendant is a mere possessor, without claim of title, he may still give evidence tending to raise a presumption that the title under which the plaintiff claims is extinct. He is entitled to have facts and circumstances submitted to the jury, from which a presumption may arise of a conveyance of the estate claimed by the plaintiff; so that if, in the judgment of the jury, such facts and circumstances are sufficient to warrant the inference of a conveyance, they may say so. By thus showing the title out of the plaintiff, the defendant may protect his possession, although he may be unable to trace such title to himself. A defendant in an action of ejectment is entitled to avail himself of an outstanding title against the plaintiff, although he is in possession without color or claim of title; his possession is good against all the world except the legal owner, and by showing the title in another, he destroys the plaintiff's right to recover.²

§ 112. **Where the Defendant is an Intruder.**—Where the defendant has intruded without claim of right, upon the actual possession of another, there is reason in compelling him to restore the possession before he is permitted to show title in a third person. But the reason does not apply in a case of that constructive possession which the law implies as following title; and a defendant entering, declaring that he takes the land as a new possession, acknowledging his ignorance of the owner, and expressing a desire to discover him, for the purpose

¹ *Schauber v. Jackson*, 2 Wend. ber v. Jackson, 2 Wend. (N. Y.) 13; (N. Y.) 13; see *Estoppel to Deny Title*, *Safford v. Hynds*, 39 Barb. (N. Y.) Chapter XVIII. 625; *Traphagen v. Traphagen*, 40

² *Tyler on Ejectment*, 564; *Schau- Barb. (N. Y.) 537.*

of purchasing, is not precluded from showing the title out of the plaintiff, notwithstanding he may be unable to trace it to himself.¹

§ 113. **Evidence of Recitals in Deeds.**—Questions of evidence often arise in actions of ejectment as to the effect of recitals in written instruments relating to lands. As a general rule it may be said that a recital in a deed binds the parties and those who claim under them. It binds parties and privies; privies in blood, privies in estate, and privies in law. But it does not bind mere strangers to the deed in which the recital is contained, or those who claim by title paramount to the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed.²

§ 114. **When a Recital is Evidence Against a Stranger.**—To the rule stated in the preceding section there is an apparent exception. The exception may be illustrated thus: If there is a recital of a lease in a deed of release, and in a suit against a stranger, the title under the lease comes in question, then the recital of the lease in such release is not in itself evidence of the existence of the lease. But, if the existence and loss of the lease be established by other evidence, then the recital is admissible as secondary evidence in the absence of more perfect proof, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, then the recital will of itself, under such circumstances, materially fortify the presumption, from lapse of time and length of possession, of the original existence of the lease.³

The recital in a grant of the date of the certificate of survey upon which

¹ Jackson v. Morse, 16 Johns. (N. Y.) 197 (1819); Schaubert v. Jackson, 2 Wend. (N. Y.) 13 (1828); Tyler on Ejectment, 564; Hyatt v. Woods, 4 Johns. (N. Y.) 150. ² Terrett v. Taylor, 9 Cranch. (U. S.) 43; Beau v. Parker, 17 Mass. 591; Penrose v. Griffith, 4 Binn. 23; Kite's Heirs v. Shrader, 3 Litt. (Ky.) 447; Marchioness, etc., v. Harris, 2 P. Williams, 432; Shelley v. Wright, Willes, 9; Ford v. Gray, Salk. 285; Terrett v. Taylor, 9 Cranch. (U. S.) 43; Tyler on Ejectment, 566; Penrose v. Parker, 17 Mass. 591; Kite's Heirs v. Shrader, 3 Litt. (Ky.) 447.

³ Marchioness, etc., v. Harris, 2 P. Williams, 432; Shelley v. Wright, Willes, 9; Ford v. Gray, Salk. 285; Terrett v. Taylor, 9 Cranch. (U. S.) 43; Tyler on Ejectment, 566; Penrose v. Griffith, 4 Binn. (Penn.) 231; Beau v. Parker, 17 Mass. 591; Kite's Heirs v. Shrader, 3 Litt. (Ky.) 447.

the grant was founded is not sufficient evidence of the time when the survey was made. Thus, where a grant of a tract of land issued after the time of the demise laid in a declaration of ejectment for the same land, and after the suit was brought, reciting the date of the certificate of survey to be prior to the time of bringing the suit, it was held, that the grant was not sufficient evidence of title, without producing the certificate itself. *Henderson v. Parker*, 3 Har. & J. (Md.) 117.

§ 115. **Lease—Breach of Covenant—Under-letting Without Consent.**—If the breach consists in assigning or under-letting without the consent of the lessor, it is sufficient for the plaintiff to show that another person was found in possession, acting and appearing as tenant, this being *prima facie* evidence of an under-letting and sufficient to throw upon the defendant the burden of proving in what character such person held possession of the premises. And in such case, the declarations of the occupant are admissible against the defendant, to show the character of his occupancy.¹

§ 116. **Mesne Profits.**—Damages given in actions of ejectment are now merely nominal, the possession and title being generally the subject of the controversy, but the plaintiff is permitted to recover his real damages in an action of trespass for mesne profits, or some statutory proceeding, in which he complains of his having been ejected from the possession of the premises by the defendant and held out by him and deprived of the rents and profits, during the period alleged in the declaration or complaint. The evidence on the part of the plaintiff, usually consists of proof of his possessory title; the defendant's wrongful entry; the time of his occupation; the value of the mesne profits; and any other damages and expenses recoverable in this action.²

There is some diversity in the different American States, as to the remedy for mesne profits in this action, which is more particularly discussed under the title of Mesne Profits, Chapter XIX.

When a defendant in ejectment is evicted, and afterward restored to possession by an order quashing the *habere facias* and awarding a writ of restitution, and the writ of restitution itself is afterward quashed, the defendant is liable to an action for mesne profits. *Trabue v. Kellar*, 3 A. K. Marsh. (Ky.) 517.

A tenant in common who has recovered in ejectment may maintain an action for mesne profits against his companion. *Goodtitle v. Tombs*, 3

¹ 2 Greenleaf on Evidence, § 328; *Lee v. Cooke*, Gilmer (Va.), 331; *Coleman v. Rickarby*, 5 East, 4. *man v. Parish*, 1 McCord (S. C.), 264;

² 2 Greenleaf on Evidence, § 332; *Sumpter v. Lehigh*, 1 Const. (S. C.) 102; *Gill v. Cole*, 1 Har. & J. (Md.) 403; *Cox v. Callender*, 9 Mass. 533.

Wils. 118; Cutting v. Derby, 2 Wm. Black, 1077; Camp v. Hornesley, 11 Ired. (N. C.) 211.

Evidence of the circumstances under which defendant received the rents was properly admitted. *Faulcon v. Johnston*, 102 N. C. 264; 9 S. E. Rep. 394 (1889).

Testimony that the adverse holder listed the land for taxation *ante litem motam* is admissible. *Ibid*.

A will provided that the widow should hold the real estate for life, and that upon her death it should go to the testator's daughter. The daughter died, leaving as her heirs her mother and brothers and sisters. The mother then sold the property, and subsequently died. Held, in ejectment by the heirs against the purchaser, that, from the date of the deed down to the mother's death, his possession was that of a tenant for life, and that he was not entitled to compensation for improvements put upon the land by him during that time. *Curtis v. Fowler*, 66 Mich. 696; 33 N. W. Rep. 804.

In an action to recover rent moneys received by defendant, defendant alleged that the land during the time when he received the rents was in the adverse possession of one who leased it, and directed the payment of the rents to defendant. *Held*, that the lessee could testify that he paid the rent to defendant because he was told to do so by such adverse holder, and that the latter claimed the land. *Faulcon v. Johnston*, 102 N. C. 264; 9 S. E. Rep. 394 (1889).

A joint action for mesne profits may be supported by several lessors of the plaintiff in ejectment, after recovery therein, although there were only separate demises by each. *Chamier v. Lingon*, 5 Maule & S. 64; 2 Chitty 410; *Holdfast v. Shepard*, 9 Ired. (N. C.) 222.

§ 117. **Subsequent Profits—Evidence Required.**—When the plaintiff seeks to recover such profits only as have accrued subsequently to the demise in the ejectment, no other evidence of his title is, generally speaking, required, than certified or examined copies of the judgment in ejectment, of the writ of possession, and of the sheriff's return thereon; but if there is any reason to suppose that the defendant will attempt to answer this *prima facie* case by setting up a title in himself or a third party, or if the case be one of those excepted cases in which the judgment in ejectment is not admissible evidence, then the plaintiff should be prepared with the regular proof of his title, although he does not seek to recover the mesne profits anterior to the day of the demise.¹

§ 118. **Mesne Profits Accruing before the Demise.**—Where the plaintiff seeks to recover the mesne profits which accrued before the demise laid in the complaint or declaration in the ejectment suit, he must produce the regular proof of his title or right to the possession of the premises. The judgment

¹ Adams on Ejectment, 458.

in ejectment is not admissible in evidence. He must also prove an entry upon the lands as in other cases.¹

§ 119. **The Rule Stated in Adams.**—When the plaintiff seeks to recover the mesne profits accruing antecedently to the day of the demise in the declaration in the ejectment, he must produce the regular proof of his title, or right to the possession of the premises, and the judgment in ejectment is not admissible in evidence for him. He must also, it appears, in such case prove an entry upon the lands, though some doubt seems to exist as to what proof of entry will be sufficient. By some it has been said, that the plaintiff is entitled to recover the mesne profits only from the time he can prove himself to have been in possession; and that, therefore, if a man make his will and die, the devisee will not be entitled to the profits until he has made an actual entry, or in other words, until the day of the demise in the ejectment, for that none can have an action for mesne profits unless in case of actual entry and possession. Others have holden, that when once an entry has been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time; and they say that if the law were not so, the courts would never have suffered plaintiffs in ejectment to lay their demises back in the manner they now do, and by that means entitle themselves to recover profits to which they would not otherwise be entitled. The latter seems the better opinion; but these antecedent profits are now seldom the object of litigation, from the practice of laying the demise and ouster immediately after the time when the lessor's title accrues.²

§ 120. **The Judgment in Ejectment as Evidence.**—The judgment in ejectment is in general conclusive evidence as against the defendant and his servants, of title in the plaintiff from the date of the demise laid in the declaration.³ The rule

¹ 2 Greenleaf on Evidence, § 333; Burr. 665, 668; West v. Hughs, 1 Har. Adams on Ejectment, 454; Jackson & J. (Md.) 574.

v. Randall, 11 Johns. (N. Y.) 405; ² Adams on Ejectment, 455.

Dewey v. Osborn, 4 Cow. (N. Y.) 329; ³ The term "demise laid in the declaration" is tantamount to the phrase Marshall v. Dupey, 4 Marsh. (N. S.) 389; Poston v. Jones, 2 Dev. & B. 294; Whittington v. Christian, 2 titled to possession." Under the modern practice it would express the idea

is founded on the reason that the parties have once had their day in court on the question of title and that is sufficient.¹ If the plaintiff claims profits accruing prior to the demise as he has laid it, the question of title is then open again for investigation.²

The term "demise" may be more fully illustrated by reference to the common law declaration on ejectment.

Declaration by original, on a single demise.

IN THE QUEEN'S BENCH.

——Term, in the——year of the reign of Queen Victoria,——(to wit, Richard Roe, late of——, yeoman, was attached to answer John Doe of a plea, wherefore the said Richard Roe, with force and arms, etc., entered into——messuages,——barns,——stables,——outhouses,——yards,——gardens,——orchards,——acres of arable land,——acres of meadow land and——acres of pasture land, with the appurtenances, situate, etc., which A B had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against the peace of our lady the now Queen, (etc.) And thereupon the said John Doe, by——his attorney, complains; that, whereas, the said A B, on (etc.) at (etc.) had demised the said tenements with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the——day of——then last past, for and during and until the full end and term of——years from thence next ensuing, and fully to be complete and ended: By virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and became and was thereof possessed, for the said term so to him thereof granted: And the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on (etc.) with force and arms, (etc.) entered into the said tenements with the appurtenances, which the said A B had demised to the said John Doe, in manner and for the term aforesaid, which is not yet expired, with the appurtenances, in——which A B hath demised to the said John Doe, for a term which has not expired, and ejected him

better to say, "during the time the plaintiff was wrongfully kept out of possession."

¹Chirac v. Reinicker, 11 Wheat. (U. S.) 280; Kuhns v. Bowman, 91 Pa. St. 504. The record of recovery in ejectment, is conclusive evidence of the title in the lessor of the plaintiff, from the time of the demise laid, against the defendant and his servants, who can not, therefore, in bar of an action of trespass, show title in another after that time. Dewey v. Os-

borne, 4 Cow. (N. Y.) 329; Marshall v. Dupey, 4 Marsh. (Ky.) 389 (N. S.); Poston v. Jones, 2 Dev. & Batt. (N. C.) 294; Whittington v. Christian 2 Rand. (Va.) 353. Against third persons, however, it is not conclusive but only admissible to prove the possession. Chirac v. Reinicker, 11 Wheat. (U. S.) 280.

²Dewey v. Osborne, 4 Cow. (N. Y.) 329; Marshall v. Dupey, 4 Marsh. (Ky.) 389 (N. S.); Poston v. Jones, 2 Dev. & B. (N. C.) 294.

from his said farm; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against our peace: And have you there the names of the pledges, and this writ. Witness ourselves at Westminster, the——day of——in the——year of our reign.

Adams on Ejectment, 465.

§ 121. **The Judgment in Ejectment.**—Where the plaintiff proceeds only for the recovery of the mesne profits, accruing subsequently to the day of the demise in the declaration, the judgment in ejectment is *prima facie* evidence of his right; and it is immaterial whether the judgment is founded on a verdict, or has been obtained by default.

The judgment is also evidence against a party coming into possession and occupying the premises under the defendant in the ejectment, although not himself included in it;¹ and it is in like manner evidence when the action is brought against a party who has not been in the actual occupation, provided it be proved that the defendant in ejectment was his tenant, and that the relation of landlord and tenant subsisted between them;² and this relationship must be proved by the production of the agreement, if the tenancy has not been created by parol.³

The record of a suit by plaintiffs against the adverse holder, in which they recovered possession, is admissible to show adverse occupancy. *Faulcon v. Johnston*, 102 N. C. 264; 9 S. E. Rep. 394 (1889).

The judgment in the preceding action of ejectment is also evidence in the action for mesne profits against a party coming into possession and occupying the premises under the defendant in the ejectment, although not himself included in it; he is in such case a privy to the record. *Doe v. Whitcomb*, 8 Bing. 46.

Nor can the record of the judgment in ejectment be objected to by the ejected defendant, on the ground that title to the land can not be litigated in a personal action, as the application of the rule would bar his action for the crops. *Carlisle v. Killebrew*, 89 Ala. 329; 6 So. Rep. 756.

In trespass to try titles, it seems that the record of a previous suit between the ancestor of the plaintiff and the defendant for the same premises may be good evidence to show notice to the latter of a paramount title, in order to fix a period from which the plaintiff is entitled to recover damages for the occupancy of the premises. *Kennedy v. Heirs of McCartney*, 4 Porter (Ala.), 141.

If the mortgagee, having a judgment for possession upon his mortgage, sue a writ of entry at common law, he may recover judgment for mesne

¹ *Doe v. Whitcomb*, 8 Bing. 46.

² *Doe v. Harvey*, 8 Bing. 239; Adams

³ *Doe v. Harlow*, 12 Ad. & Ell. 42, on Ejectment, 457.
note *d*.

profits from the time of rendition of the prior judgment. *Haven v. Adams*, 8 Allen (Mass.), 368.

Neither can the judgment be excluded as evidence, under the rule that a prior judgment in ejectment is not admissible in a subsequent suit between the parties, as the rule applies only to a subsequent suit in ejectment. *Carlisle v. Killebrew*, 89 Ala. 329; 6 So. Rep. 756.

§ 122. **When the Action Is Against Third Persons.**—When a judgment in ejectment is recovered against the person in the actual possession of the premises, and the plaintiff afterward brings an action for the recovery of mesne profits against the person under whom the defendant in the ejectment suit held the possession, to entitle the plaintiff to recover the burden of proof is upon him to show, (1) that he had, at the time the trespasses mentioned in the declaration were committed, the actual possession of the premises, or a title thereto; (2) that the defendant entered upon the possession of the plaintiff and expelled him, and kept him out of possession; (3) that the defendant, by his agents or tenants, received the rents, issues and profits while the plaintiff was kept out of possession; (4) that the plaintiff had, before the commencement of the action for mesne profits, re-entered upon the premises, and regained possession thereof; and (5) the part of the premises held by the defendant's authority, and the value thereof.¹

§ 123. **Proof of Defendant's Possession When the Action Is to Recover Mesne Profits.**—The plaintiff must also prove the length of time that the defendant has been in possession of the premises, for the judgment in ejectment affords no evidence of possession. He can only recover damages for the time he proves the defendant to have been in actual occupation, or in receipt of the rents and profits from parties in possession under them.²

§ 124. **Execution of the Writ of Possession.**—In actions for mesne profits, proof of the execution of a writ of possession is not necessary, if the plaintiff has been let into possession by the defendant. And it has been doubted whether

¹ The fact that persons who are not parties to an ejectment suit undertake the defense of such suit, and fail therein, will not furnish the slightest evidence of the plaintiff's title or possession in an action against such persons for mesne profits. *Ains-*

lie v. The Mayor, etc., of New York, 1 Barb. (N. Y.) 158; *vide Poston v. Henry*, 11 Ired. (N. C.) 301.

² *Adams on Ejectment*, 458; *Dodwell v. Gibbs*, 2 Car. & P. 615; *West v. Hughs*, 1 Har. & J. (Md.) 574.

such evidence is ever necessary, except upon judgment by default; but it is, notwithstanding, prudent to be prepared with it in all cases, unless the plaintiff has been let into possession by the defendant.¹

The reason assigned for this distinction is, that where the judgment is had against the tenant in possession the defendant, by entering into the consent rule, is estopped both as to the lessor and lessee, so that either may maintain trespass, without an actual entry, but that, where the judgment is had against the casual ejector, no rule having been entered into, the lessor shall not maintain trespass without an actual entry, and, therefore, ought to prove the writ of possession executed. But this reasoning is not satisfactory; for, if the tenant be concluded by the judgment in the ejectment from controverting the plaintiff's title, it should seem he is concluded from controverting his possession, for possession is part of his title. See *Thorp v. Fry*, B. N. P. 87, *et* S. N. P. 693 (n. 50) *et* *Aislin v. Parkin*, Burr. 665.

In an action for mesne profits, founded on a recovery by default against the casual ejector, it is, in general, necessary to show a writ of possession executed. But not where the tenant voluntarily abandons the possession, and the plaintiff in ejectment enters. *Jackson v. Combs*, 7 Cow. (N. Y.) 36.

Where the judgment in ejectment is against the tenant who comes in and defends, the judgment is sufficient evidence in the action for mesne profits, without any writ of possession executed. *Jackson v. Combs*, 7 Cow. (N. C.) 36.

§ 125. For What Time the Defendant Is Liable.—As a general rule of law the defendant can not be held liable for mesne profits accruing prior to his own entry into the premises, even though such profits have been taken by those under whom he entered.² He can be charged only for the rents and profits accruing during the time he has been in the actual possession of the premises in dispute, in the character of a disseizor.³ A plaintiff in ejectment can recover mesne profits only from the time his right to the possession accrued. He is not restricted, however, to the rents accruing before the commencement of the suit in ejectment, but may recover for the rents and profits up to the time of the trial if the defendant continues in possession.⁴

§ 126. Mesne Profits and the Statute of Limitation.—The rule of law which allows the plaintiff to recover mesne profits

¹ *Adams on Ejectment*, 458; *Calif.* 487; *Dean v. Tucker*, 58 *Miss.* 487; *Ringhouse v. Keener*, 63 *Ill.* 487.

² *Gardner v. Grannis*, 57 *Ga.* 539. 230; *Bell v. Medford*, 57 *Miss.* 31;

³ *Jacks v. Dyer*, 31 *Ark.* 334. *Whissenhunt v. Jones*, 78 *N. C.* 361;

⁴ *McCrubb v. Bray*, 36 *Wis.* 383; *Dawson v. McGill*, 4 *Whart. (Penn.)* 230. see also *New Orleans v. Gaines*, 15 *Wall. (U.S.)* 624; *Love v. Shartzler*, 31

from the time his right to the possession accrued must be considered in connection with the statute of limitation. All rents and profits which have accrued prior to the time fixed by the statute are barred, and can not be recovered if the statute is pleaded.¹

§ 127. **The Doctrine of Mesne Profits Discussed.**—The law applicable to mesne profits in actions of ejectment is discussed in the chapter of this work devoted to the subject and where it is believed the general rules of law and probably some questions of the evidence in actions for their recovery as they present themselves incidentally, are fully discussed.²

¹ Ringhouse v. Krener, 63 Ill. 230 ²Chapter XIX, Mesne Profits and (1873); Ainslie v. Mayor, etc., 1 Damages. Barb. (N. Y.), 168; Hill v. Meyers, 46 Pa. 15.

CHAPTER XII.

THE ESSENTIALS OF THE PLAINTIFF'S CASE.

- § 1. A Maxim of Our Law.
- 2. The Plaintiff's Case.
- 3. Plaintiff Must Recover on the Strength of His Own Title—Exceptions to the Rule.
- 4. The Subject Continued.
- 5. Prior Possession *Prima Facie* Proof of Title.
- 6. Prior Possession, When Not Sufficient.
- 7. The Title Necessary to Support the Action.
- 8. Statutory Regulations.
- 9. Plaintiff's Title, How Established.
- 10. Titles, Legal and Equitable.
- 11. Questions of Local Law.
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- 13. Equitable Defenses in Some States.
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- 16. The Rule in the Federal Courts.
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- 72. Title Acquired after Suit Brought.

§ 1. **A Maxim of Our Law.**—It is a maxim of the law that the party in possession of property is considered the owner until the contrary is proved.¹ It is necessary, therefore, for a plaintiff in ejectment to show in himself a good and sufficient title to the disputed lands. He will not be assisted by the weakness of the defendant's claim, for the possession of the latter gives him a right against every man who can not establish a title; and if he can answer the case on the part of the plaintiff by showing the real title to be in another, it will be sufficient for his defense, excepting of course those cases in

¹ Adams on Ejectment, 33; Run- v. Dyball, 1 M. & M. 346; Ricard v. nington on Ejectment, 15; Franklin Williams, 7 Wheat. (U. S.) 59. v. Palmer, 50 Ill. 202 (1869); Hughes

which the defendant is estopped from disputing the claimant's title, although he does not pretend that he holds the land with the consent, or under the authority of the real owner.¹

The plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's. Eldon v. Doe, 6 Blackf. (Ind.) 341; Huddleston v. Garrett, 3 Hump. (Tenn.) 629; Winn v. Cole, Walker (Miss.) 119.

He must show a complete title, and identify the land in accordance therewith. McRaven v. McGuire, 9 S. & M. (Tenn.), 34.

Plaintiff must recover on the strength of his own title, and not on the weakness of defendant's; yet long possession and actual and continued occupancy under claim of title, based on deeds, are *prima facie* evidence of title, and the mere fact that plaintiff fails to show a patent from the United States is not sufficient to defeat his action. Hacker v. Horlemus, 74 Wis. 21; 41 N. W. Rep. 965 (1889).

Evidence that one was in possession of the premises in dispute in ejectment, claiming title, over twenty years before suit brought, and that his title was transferred to plaintiff's devisor, who took possession, is sufficient as against a defendant who makes no claim of title, but relies solely on the failure of plaintiff to make out a case. Johnson v. Johnson, 70 Mich. 65; 37 N. W. Rep. 712 (1888).

Plaintiff in an action of ejectment can recover solely upon the strength of his own title, and not through the weakness of defendant's. If he have none himself, he can not maintain the action, even though defendant's paper title be fatally defective. Chivington v. Colorado Springs Co., 9 Colo. 597; 14 Pac. Rep. 212 (1887).

§ 2. **The Plaintiff's Case.**—A plaintiff in ejectment may rest when he has shown a *prima facie* right to recover. He is not required to anticipate the defense that will be interposed. The plaintiff is not bound to know whether the defendant will rely upon the statute of limitations, upon a paramount outstanding title; that the persons claiming to be heirs were in fact not heirs; that they had previously conveyed to other parties; that their deeds were forgeries, or any other of the defenses that may exist to a recovery in ejectment. To require a plaintiff in ejectment to anticipate every defense that might be interposed would be unseasonable—would create delay in the dispatch of business, and work great hardships. He is only required by the rules of evidence, to show a right unopposed, to recover, and then permit the defendant to disclose

¹ Adams on Ejectment, 33; Run- Preston's Heirs v. Bowman, 6 Wheat. ington on Ejectment, 15; Eldon v. (U. S.) 580; Stewart v. Town, 4 Cow. Doe, 6 Blackf. (Ind.) 341; Huddleston (N. Y.) 602; Sparkman v. Porter, 1 v. Gar ett, 3 Hump. (Tenn.) 629; Paine (U. S. C. C.) 457.

his defense; after which he is entitled to rebut any defense that may have been interposed.¹

§ 3. Plaintiff Must Recover on the Strength of His Own Title, etc.—Exceptions to the Rule—The Law Stated by Treat, C. J.—As a general principle, a plaintiff in ejectment must establish a legal title to the premises in controversy. He must recover on the strength of his own title and not on the weakness of that of his adversary. But there are two exceptions to this rule. Such a relation may exist between the parties as will dispense with the production of title on the part of the plaintiff. A party in possession under the plaintiff can not controvert the title under which he entered. If he was admitted into possession under a contract of purchase with the plaintiff, the latter, in an action to regain the possession, is not required to make proof of his title. And in an action against a tenant the landlord need not show title. The tenant is estopped from denying the title of his landlord. His possession is subservient to the title of the party under whom he entered.

He is not permitted to betray the possession with which he was intrusted. He can not set up a better title in himself or a third person. Public policy and common honesty alike forbid that he should do any act which may defeat or endanger the title of his landlord. He must surrender up the possession before he can assail or question the title. He must put the landlord in the position he occupied when he parted with the possession. The same principle applies to those acquiring the possession from the tenant. The relation of landlord and tenant attaches to all who succeed to the possession through or from the tenant. They acquire no greater right than the party from whom they received the possession.²

The rule of law, that a person coming into possession of lands under another can not be permitted to deny the title of the latter, when called upon to surrender, is of almost universal application. Even if the person

¹ Walker, J., in *Huls v. Buntin*, 47 Ill. 396 (1868).

² Treat, C. J., in *Tilghman v. Little*, 13 Ill. 239 (1851); *Jackson v. Davis*, 5 Cow. (N. Y.) 123; *Cooper v. Smith*, 8 Watts (Penn.), 536; *Riley v. Million*, 4 J. J. Marsh. (Ky.) 395; *Binney v. Chapman*, 5 Pick. (Mass.) 124; *Jack-* son v. Spear, 7 Wend. (N. Y.) 401; *Camp v. Camp*, 5 Conn. (N. Y.) 291; *Anderson v. Darby*, 1 Nott & McCord, (S. C.) 369; *Henly v. Bank*, 16 Ala. 552; *Wood v. Turner*, 7 Humph. (Tenn.) 517; see also *Wells v. Mason*, 4 Scam. (Ill.) 90; *Blight's Lessee v. Rochester*, 7 Wheat. (U. S.) 735 (1822).

entering had a valid title at the time, he is in law deemed to have waived it, and to have admitted title in the person under whom he entered. So one making a contract to buy land, and taking possession under it, though strictly speaking the relation of landlord and tenant is not thus created, yet the vendee, in an action of ejectment brought by the vendor against him, is absolutely estopped from either showing title in himself, or setting up an outstanding title in another. The agreement to purchase is an acknowledgment of the title of the vendor, and hence the vendee is not permitted to set up an outstanding title, when called upon to respond in the action of ejectment. *Jackson v. Ayres*, 14 Johns. (N. Y.) 224; *Graham v. Peat*, 1 East, 244; *Baker v. Mellish*, 10 Ves. Jr. 544; *Gravenor v. Woodhouse*, 1 Bing. 38; *Phillips v. Pearse*, 5 Barn. & Cres. 433; *Sullivan v. Stradling*, 2 Wils. 208; *Parker v. Manning*, 7 T. R. 539; *Cook v. Loxley*, 5 T. R. 4; *Blake v. Foster*, 8 T. R. 487; *England v. Slade*, 4 T. R. 682; *Hodson v. Sharpe*, 10 East, 355.

A claim of title, which can not be set up by a person while in possession, can not be set up by another person who comes into possession under him. This doctrine applies to the case of a person who comes into possession, either as an intruder or under one who has so purchased; and in either case he is precluded from questioning the plaintiff's right of possession. *Jackson v. Harder*, 4 Johns. (N. Y.) 202; *Jackson v. Bard*, 4 Johns. (N. Y.) 230; *Jackson v. Walker*, 7 Cow. (N. Y.) 637.

§ 4. **The Subject Continued.**—But the tenant may show that the title of the landlord has terminated either by its original limitation, or by a conveyance to himself or a third person, or by the judgment and operation of law. If the landlord transfers the estate, the allegiance of the tenant is due to the grantee. If the estate is vested in a third person by operation of law, the tenant holds the possession subject to the title of such person. The tenant may purchase in the premises under the judgment against the landlord, and set up the title thus acquired in bar of an action brought against him by the landlord. In such cases the relation of landlord and tenant becomes dissolved, and the latter no longer holds the premises under the former.¹

§ 5. **Prior Possession Prima Facie Proof of Title.**—The rule is well settled that in actions of ejectment proof of possession of land by a party claiming to be the owner in fee is *prima facie* evidence of his ownership and seizin of the inheritance.²

¹ *Treat, C. J.*, in *Tilghman v. Little*, 666; *Gregory's Heirs v. Crabb's* 13 Ill. 239 (1851); *England v. Slade, Heirs*, 2 B. Mon. (Ky.) 234; *Nellis v. 4 Durn. & East*, 682; *Jackson v. Lathrop*, 22 Wend. (N. Y.) 121.

Davis, 5 Cow. (N. Y.) 123; *Jackson v. Rowland*, 6 Wend. (N. Y.) 59; *Davis v. Easley*, 13 Ill. 192; ²*Ricord v. Williams*, 7 Wheat. (U. S.) 59.

It is sufficient, therefore, for a plaintiff, in order to make *prima facie* proof of title, to trace his title back to an immediate or remote grantor, who, at the time of his conveyance, was in possession of the land, claiming it in fee.¹

But possession alone, unexplained by collateral circumstances, is evidence of no more than the mere fact of occupation by right; the law will not presume a wrong, and a mere possession is just as consistent with a present interest under a lease for years or for life as in fee. It must depend on the collateral circumstances what is the quality and extent of the interest claimed by the party; and to that extent only will the presumption of law go in his favor. The declarations of the party while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of his possession, adjudge him to be in under a higher right or a larger estate.²

In ejectment, plaintiff must recover upon the strength of his own title, and can not rely on any supposed or actual weakness of his adversary's title. *Roberts v. Baumgarten* (N. Y.), Sup. 519; 18 Civ. Proc. R. 161; 13 Cent. Rep. 420; *O'Brien v. Gaslin*, 24 Neb. 559; 39 N. W. Rep. 449.

Prior possession of real property is a sufficient legal estate therein to enable a party to maintain ejectment in the federal court for the recovery of the possession of the same from an intruder. *Wilson v. Fine*, 38 Fed. Rep. 789 (1889).

As between E., in possession under a void tax deed, and B. and D., asserting title under a quit-claim from one having no interest, E. has the paramount right to possession. *Sarver v. Beal*, 36 Kan. 555; 13 Pac. Rep. 743 (1887).

Plaintiff may recover if he shows that he has a claim to the property by color of title, as against a defendant in possession without color or claim of title other than by possession. *Douglass v. Ruffin*, 38 Kan. 530; 16 Pac. Rep. 783 (1888).

A person in possession of land, although showing no title to the same, is entitled to retain such possession until a rightful owner arises, and shows title to the land. *Harvey v. Harvey*, 26 S. C. 608; 2 S. E. Rep. 3 (1887).

Where neither party shows a good paper title, but plaintiff takes possession, builds a house, and puts a tenant therein, such possession will support ejectment against one who merely shows a later possession. *Strange v. King*, 84 Ala. 212; 4 So. Rep. 600 (1888).

Except as against a mere trespasser, one bringing ejectment must have the

Barger v. Hobbs, 67 Ill. 592; *Keith v.* ¹ *Anderson v. McCormick*, 129 Ill. 308; 21 N. E. Rep. 805 (1889).
Keith, 104 Ill. 397; *Harland v. East-*
man, 119 Ill. 22; 8 N. E. Rep. 810 ² *Ricard v. Williams*, 7 Wheat. (U. S.) 105, 106.

legal title to the land at the commencement of the action; and the fact that he subsequently obtains such title will not aid him to sustain the action, or authorize a recovery. *Green v. Jordan*, 83 Ala. 220 (1888).

Plaintiff in ejectment may recover, as against a mere trespasser, on proof of his former possession only, without regard to his title. *Id.*

A receipt from the register and receiver of a local land office, reciting payment of the proper fees for the entry of lands as a homestead, and testimony to show occupation of the land described, sufficiently show a homestead title to sustain an ejectment against a trespasser. *Whittaker v. Pendola*, 78 Cal. 296; 20 Pac. Rep. 680 (1889).

In ejectment against one claiming under a tax deed, the plaintiff must trace his title to the government, or to one who had possession of the premises. *Grayson v. Schlamm*, 126 Ind. 142; 25 N. E. Rep. 810 (1890).

Although in ejectment the legal title must prevail, plaintiff, to rebut any presumption of outstanding title arising from a certain deed, conveying the land in controversy to defendant, may give in evidence a defeasance executed the same day as the deed, and show that the deed, absolute on its face, was a mortgage only; that the debt thereon had been paid; and that defendant knew of such defeasance and payment before acquiring any title to the premises. *Mowry v. Cummings*, 34 Fed. Rep. 713.

Where it appears, in ejectment, that plaintiff had a prior actual possession of the land, with both color of title and claim of ownership, and that defendants derived their title, apparently only an imperfect equitable one, from plaintiff, through their father, who had purchased the land of plaintiff, paying a part of the purchase money, and taking possession, plaintiff is entitled to recover. *Ware v. Dewberry*, 84 Ala. 568; 4 So. Rep. 404 (1888).

In Georgia, a plaintiff in ejectment may recover the premises in dispute upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry, and without any lawful right whatever; and the same rule applies where a bill in equity is filed as the equivalent of an action of ejectment, resort to equity being necessary to prevent loss and injury to the rightful possessor, in consequence of the alleged insolvency of the trespasser. *Nolan v. Pelham*, 77 Ga. 262; 2 S. E. Rep. 639 (1887).

Plaintiffs in ejectment, on proof that a certain person died in possession of the premises, and of title derived from him through his heirs or devisees, are entitled to recover as against one who subsequently took possession of the land without any legal right, and who was not in a position to avail himself of title by prescription. *Bagley v. Kennedy*, 81 Ga. 721; 11 S. E. Rep. 1091 (1889).

In ejectment, the plaintiff proving no title, but relying on prior possession, of which, as well as of his ouster, the evidence was vague and unsatisfactory, there being nothing to show that either plaintiff or defendant was in possession of any definite portion of the land, neither having any inclosure thereon, judgment for defendant will not be disturbed. *Garner v. Wright*, 77 Cal. 85; 19 Pac. Rep. 184 (1888).

The city of New York took possession of land under condemnation proceedings for the purposes of a market, paid the awards to the owners, removed all dwelling-houses then on the land, inclosed it, and erected various buildings on it. This possession continued for more than twenty years,

when the buildings were removed, and the land converted by the city into a park. Several years later the land was sold in lots by the commissioners of the sinking fund. Some of the purchasers refused to take title, and litigation followed. During the ensuing five or six years the lots refused were neglected, and defendants took possession of them. *Held*, that the city had such title by virtue of its possession as would sustain ejectment against a mere intruder. *City of New York v. Carleton*, 113 N. Y. 284; 21 N. E. Rep. 55; 22 Jones & S. 555 (1889).

Where both parties claim under the same patent, plaintiff having showed possession and defendant having introduced evidence of an earlier possession by a lessee of his predecessor, plaintiff need not show adverse possession for fifteen years in order to recover. *Ratcliff v. Belfont Iron Works Co.*, 87 Ky. 559; 10 S. W. Rep. 376 (1889).

Proof of plaintiff's actual prior possession under claim or color of title is sufficient to maintain ejectment against a naked trespasser, without showing that the possession continued to the time of, and was disturbed by, the trespass. *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264; 6 So. Rep. 837 (1890).

The fact that one dies in possession of land, and that the same is administered on and sold, under the order of a court of ordinary, as his property, is sufficient evidence of original title in him to enable a purchaser at the sale, or others claiming under him, to recover in ejectment. *Findley v. Johnson*, 84 Ga. 69; 10 S. E. Rep. 594 (1890).

§ 6. **Prior Possession—When Not Sufficient.**—Prior possession is as a rule good ground of recovery in ejectment against one who claims by mere possession, yet if such prior possession was not continued but voluntarily abandoned, it becomes unavailing as against a subsequent possession; and though such previous possession was not voluntarily abandoned yet it will not avail against a subsequent possession acquired by ejectment.¹

In ejectment plaintiff did not show a perfect chain of title back to the common source from which both parties claimed, and did not show that he or his predecessors ever had any actual possession of the lots of land in question further than mapping or platting them. *Held*, that this was not sufficient, as against actual possession by defendant, to put him to proof of superior title in support of his possession. *L'Engle v. Reed* (Fla.), 9 So. Rep. 213 (1891).

§ 7. **The Title Necessary to Support the Action.**—In order to maintain an action of ejectment the plaintiff must have such an interest in or title to the lands sought to be recovered as entitles him to the immediate possession of the same. What such a title is or the source from which it is derived depends, of course, upon the peculiar circumstances of each case, but it will be sufficient to entitle the plaintiff to recover if it shows in him

¹ *Jackson v. Walker*, 7 Cow. (N. Y.) 637.

a legal right of possession at the time of the commencement of the suit. As a general rule the plaintiff in ejectment can not recover without he has at the time of the commencement of his action such an interest in the premises as entitles him to the immediate possession, and this interest exists by force of the title necessary to support the action.¹

Illustrations.

Plaintiff's title generally.

In ejectment the plaintiff must recover, if at all, on the strength of his own title, and not from the weakness or want of title in the defendant. *Kelly v. McKeon*, 67 Wis. 561; 31 N. W. Rep. 324 (1887).

As against one in actual possession he must recover on the strength of his own title, not on the weakness of his adversary's. *Low v. Settle*, 32 W. Va. 600; 9 S. E. Rep. 922 (1889); *Eldon v. Doe*, 6 Blackf. (Ind.) 341; *Huddleston v. Garrett*, 3 Humph. 629; *Winn v. Cole*, Walker (Miss.), 119; *Roe v. Harvey*, 4 Burr. 2484; *Doe v. Barber*, 2 T. R. 749; *Covert v. Irwin*, 3 Serg. & R. (Penn.) 283; *Lessee of Walker v. Coulter*, Addis. (Penn.) 390; *Lane v. Reynard*, 1 Serg. & R. (Penn.) 65; *Colston v. M'Kay*, 1 Marsh. (Ky.) 251.

The plaintiff must recover on the strength of his own title, either as being in itself good against all the world, or good against the defendant by estoppel. *Clark v. Diggs*, 6 Ired. (N. C.) 159.

In order to recover in ejectment the plaintiff must prove, first, that he had title at the time of the demise laid; and, secondly, that the defendant was in possession at the time the suit was brought. *Bailey et al. v. Fairplay, Lessee, etc.*, 6 Binn. 454.

In ejectment a plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. But a defendant can not avail himself of this rule against a plaintiff whom he has fraudulently induced to purchase a weak title. *Lane et al. v. Reynard*, 2 Serg. & R. (Penn.) 64; *contra*, *Lessee of Walker v. Coulter*, Addis. (Penn.) 390.

In an action brought to recover land against the defendant, who held possession, and who introduced no other evidence of title, defendant asked the court to charge that "no sale of land so as to pass title could be valid without deed, registration," etc., but these words were not given in the charge, which was to the effect that in actions to recover land, plaintiff must prove his case and establish his title. There were several ways of so doing. One way was to show a grant from the State by a regular chain of title; another mode was to show in the plaintiff, or those under whom he claimed, a possession under known and visible boundaries for thirty years; a third was to show a possession of twenty-one years under color of title, which would be good against the State; another mode was to show a title out of the State, and an adverse possession continuously, under color of title in the party claiming the land. Further, that the defendant showed

¹ To recover in ejectment the plaintiff must have a legal title in the land at the commencement and trial of the cause. *Carroll v. Norwood's* Heirs, 5 Har. & J. (Del.) 164; *Michael v. Nutting*, 1 Smith (Ia.), 291; *Baylor v. Neff*, 3 McLean (U. S.), 302; *Buxton v. Carter*, 11 Miss. 481.

no title, but that the plaintiff could not rely upon that fact. *Held*, that there was no error in the charge as given, nor in the failure to charge as requested. *Pearson v. Simmons*, 98 N. C. 281; 3 S. E. Rep. 503 (1887).

In ejectment in the courts of the United States the legal title must prevail, as against a mere equity; and a party claiming under a Mexican grant of an imperfect or equitable title, can not maintain ejectment against another, claiming under the same grant, by adverse derivative title, who has presented his claim and had it confirmed, whether he acted fraudulently or otherwise. *Bouldin v. Phelps*, 30 Fed. Rep. 547 (1887).

No recovery can be had upon the demise of a person who had conveyed away his whole title before the action was brought. *Hobby v. Bunch*, 83 Ga. 1; 10 S. E. Rep. 113 (1889).

The owner of the fee in lands, subject to the right of the public to use as a highway, may maintain ejectment in case of ouster. *Westlake v. Koch*, 55 Hun (N. Y.), 611; 8 N. Y. Sup. 665 (1890).

Where plaintiff in ejectment leased the premises before the action was brought, and, when defendants were found in possession, authorized the lessee to sue in plaintiff's name, it will be presumed that the lease was abandoned by mutual consent, and it can not be urged as a defense that plaintiff was not entitled to possession. *Brant v. Phillippi*, 82 Cal. 640; 23 Pac. Rep. 122 (1889).

In an action by the children of R.'s first wife to recover from the children of his second wife certain land which they allege R. held as tenant by the curtesy in the right of his first wife, it appeared that R. entered on the land under a title bond from said wife's father, who had no title, purchased the elder grant, and took a conveyance to himself; that the land, when he entered, was worth little, and that he paid as much or more than that little to acquire title; that R. conveyed the land to defendants as an advancement, having already made advancements to plaintiffs: *Held*, that a judgment for defendants was proper. *Woolfolk v. Richardson* (Ky.), 10 S. W. Rep. 320; Am. Dig. 1891, 1174.

Defendant in ejectment bought a lease of the premises from plaintiff's tenant, but, after entering, repudiated the tenancy. Plaintiff had prior possession under a deed from one who had located a mining claim including the premises. Defendant not setting up any different title, *held*, that plaintiff's title must prevail over defendant's possession, whether or not the proceedings for the location of the mining claim were valid. *Deemer v. Falkenburg*, 4 N. M. 57; 12 Pac. Rep. 717 (1887).

Defendant contracted to convey land to plaintiff on payment of \$3,000 in six months. Before the time expired plaintiff contracted to sell the land to S. for \$8,000, whereon all the parties entered into a tripartite agreement, defendant changing the time of plaintiff's payments to him to suit the terms of plaintiff's agreement with S., and agreeing to make title to S. when the latter should pay the full amount of \$8,000, of which defendant was to have \$3,000, and plaintiff the rest. S. paid defendant \$2,000, but failed to make the other payments, and defendant brought ejectment against him without making plaintiff a party, or giving him notice, obtained an award of the balance due under defendant's original contract with plaintiff, and possession of the land: *Held*, that the award did not extinguish plaintiff's equi-

table title, and that he could maintain ejectment against defendant. *McCullough v. Staver* (Pa.), 13 Atl. Rep. 440 (1888).

Plaintiff claimed the possession of certain lots and blocks, describing them by their numbers. The addition was surveyed and platted in 1871; after which the lots described in the petition were conveyed to plaintiff. The plat is described by the record as being south and west of the original town of P. "on southeast $\frac{1}{4}$ of section 9, town seven (7), range three (3) east." There is no plat of the original town of P. The certificate of the surveyor described the plat as "part N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. 9, T. 7, R. 3 east, * * * W. C. 50 links S.; N. E. corner of S. E. $\frac{1}{4}$, walnut stake two inches square, one foot long, var. $10^{\circ} 30'$ east." In 1877 the proprietor conveyed to defendant the land on which the survey had been made, describing it by the government survey. At that time the land was used as a farm, and has so been used until this action: *Held*, that the lots being incapable of identification, plaintiff could not recover. *Lane v. Abbott*, 23 Neb. 489; 37 N. W. Rep. 82.

Land was conveyed to a corporation by S., the *habendum* clause limiting the term to fifty years, or so long as the charter of said company might continue. By an amendment to its charter the corporation acquired the capacity of possible perpetual existence: *Held*, that there was left in S. only a possibility of reverter, incapable of alienation, and that one to whom S. subsequently conveyed the land, together with the reversion therein, did not acquire an estate upon which ejectment could be maintained. *Davis v. Memphis & C. R. Co.*, 87 Ala. 633; 6 So. Rep. 140 (1889).

Where plaintiff in ejectment claims under a conveyance executed when Rev. St. Wis. 1858, c. 86, § 7, was in force, declaring every grant to be void if at the time of its delivery the land is in the actual possession of another claiming under title adverse to that of the grantor, he can not recover when the land in controversy was in the actual possession of another at the time he received his deed. *Wentworth v. Abbetts* (Wis.), 46 N. W. Rep. 1044; Am. Dig. 1891, 1385.

Proof of a deed of conveyance of land from the trustees of the internal improvement fund is *prima facie* evidence of title in the grantee. *Bell v. Kendrick* (Fla.), 6 So. Rep. 868 (1890).

Land deeded to William H. Brown in January, 1849, having been conveyed by William B. Brown in April following, identity can not be presumed in favor of a plaintiff in ejectment; and, if no other evidence of identity is offered, a verdict for the defendant is properly directed. *Ambbs v. Chicago, St. P. M. & O. Ry. Co.*, 44 Minn. 266; 46 N. W. 321 (1890).

One suing in his individual capacity is entitled to recover on a patent issued to him in a representative capacity. *Burling v. Thompkins*, 77 Cal. 257; 19 Pac. Rep. 429 (1888).

The plaintiff in ejectment must show a complete title, and identify the land in accordance therewith; and where the court instructed the jury that in the absence of any proof of title to the land in controversy, on the part of the defendant, he had no right to complain of any adjustment between the lessor of the plaintiff and the person through whom the lessor of the plaintiff claimed as to the particular land the vendee of the lessor designed conveying, and that the land he designed conveying was in fact that which was actually conveyed, it was held erroneous. *McRaven v. McGuire*, 9 S. & M. (Miss.) 34.

The plaintiff, in deducing his title, must show a grant of the land, and a regular title from the grantee, or seizin of the land, for which the ejectment was brought, and a dying seized of the person under whom the lessor of the plaintiff derived his title, and a regular title from the person dying seized, or twenty years' uninterrupted and exclusive possession of the land. *Plumer v. Lane*, 4 Har. & M'H. (Md.) 72.

Where the plaintiff had shown a title, which would have entitled him to a verdict unless that of the defendant were better, it was held error in the court below to instruct the jury that they were not called upon to decide the validity of the defendant's title, but that of the plaintiff alone. *Jack v. Dougherty*, 3 Watts (Penn.), 151.

Since the rule is universal, that a plaintiff in ejectment must show the right to possession to be in himself positively, and it is immaterial as to his right to recover, whether it be out of the tenant or not, if it be not in himself, it follows that a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself. *Love v. Simm's Lessee*, 9 Wheat. (U. S.) 515.

Plaintiff's title under adverse possession.

Plaintiff in ejectment can not recover without showing a paper title in the person who executed the first deed in his claim of title, or possession by him or by some of the mesne grantees under whom plaintiff claims. *Adams v. Board County School Com'rs* (Md.), 20 Atl. Rep. 954 (1890).

Plaintiff must prove either a paper title or a title by adverse possession; and prayers based on the principles of acquiescence and estoppel recognized by courts of equity, in relation to boundary lines, are properly refused. *Winter v. White*, 70 Md. 305; 17 Atl. Rep. 84 (1889).

In ejectment, evidence that plaintiff derives title from a grantor whose ancestor had acquired the fee by adverse possession establishes the ownership of the fee in plaintiff. *McWhorter v. Hetzel* (Ind.), 24 N. E. Rep. 743.

Where the location of a boundary between the lands of the parties was the real question raised, no evidence being introduced by defendant, plaintiffs showing possession and claim of title long enough to vest in them a perfect title, were entitled to recover, and the case should have gone to the jury. *Jones' Heirs v. Spradling* (Ky.), 7 S. W. Rep. 31 (1888).

In ejectment by one claiming by prior possession under color of title, where the evidence fails to show continuous possession to the time when dispossessed by defendant, plaintiff can not recover. *Sabariego v. Maverick*, 124 U. S. 261; 8 S. Ct. Rep. 461 (1888).

An open and exclusive possession and improvement of land for any considerable time, claiming title thereto, is such presumptive evidence of title in the possessor, that an attaching creditor of a third person, in whom is the record evidence of title, will be held to be affected with notice of a deed from his debtor to the party in possession, though such deed might have been recently given, in execution of a contract of purchase under which the possession was taken and not recorded. *Publee v. Mead*, 2 Vt. 544.

The occupation of pine land, by annually making turpentine on it, is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. *Byrum v. Carter*, 4 Ired. (N. C.) 310.

An entry upon, and a continued occupation of land, with the use of a

way as appurtenant thereto, under a warranty deed which purports to convey the land, and the right of way as appurtenant to it, are some evidence of title to the land, and of a right to use the way, against one who shows no right to interfere with this use. *Shapine v. Shaw*, 150 Mass. 252; 22 N. E. Rep. 894 (1890).

A plaintiff who bases his claim to property, or its possession, upon a legal title, can not recover on the strength of an equitable title. *Tarpey v. Desert Salt Co. (Utah)*, 14 Pac. Rep. 338 (1887).

A title acquired by ten years' adverse possession under color of title descends to the heirs of the claimant, and they may enforce such title by ejectment. *Hall v. Caperton*, 87 Ala. 285; 6 So. Rep. 388 (1889).

In ejectment to determine the title to part of a wharf projecting into a navigable lake, it appeared that defendant had driven a line of piles between twenty and thirty years before the commencement of suit, which would exclude from plaintiff's occupancy all the disputed territory, and which was done to fix boundaries: *Held*, that a finding for plaintiff was error. *Jones v. Lee*, 77 Mich. 35; 43 N. W. Rep. 855 (1889).

An adverse possession will be negated when the party claiming title has never, in contemplation of law, been out of possession. This point is decided in *Barr v. Gratz's Heirs*, 4 Wheat. (U. S.) 223; *Mather v. The Ministers, etc.*, 4 Serg. & R. (Penn.) 509; *Cluggage v. Duncan's Lessee*, 1 Ib. 118; *Proprietors of Kennebec Purchase v. Springer*, 4 Mass. 418; see also *Gay v. Moffit*, 2 Bibb (Ky.), 508; *Green v. Liter*, 8 Cranch (U. S.), 229; *Commonwealth v. McGowan*, 4 Bibb (Ky.), 62; *Chiles v. Calk*, 4 Ibid. 554; *Harlock v. Jackson*, 1 Const. Rep. (S. C.) 135; *Bryant v. Allen*, 2 Hayw. (N. C.) 74; *Symonds v. True Blood*, Ibid. 235; *Hord v. Bodley*, 5 Littell (Ky.), 88; *Smith v. Morrow*, 5 Littell (Ky.), 210; *Taylor v. Shield's Heirs*, 5 Littell (Ky.), 296; *Daniel v. Ellis*, 1 Marsh. (Ky.) 60; *Codman v. Winslow*, 10 Mass. 151; *Commonwealth v. Dudley*, 10 Mass. 408; *Wells v. Prince*, 4 Mass. 64.

He who makes title to a tract of land, and is in possession of part, is in possession of the whole, according to the true limits and real position of the land. *Ridgley's Lessee v. Ogle*, 4 Har. & M'H. (Md.) 129.

Possession of a part is a possession of all the land covered by a party's title. *Anderson ads. Darboy*, 1 Nott & M'Cord (S. C.) 396; *Brandon ads. Grimke*, Ibid. 357.

Cutting a road upon land, with a view to get timber, or to fell trees in order to clear and cultivate land, constitutes, in connection with a written claim of title, a constructive possession to the whole tract described. *Spear v. Ralph*, 14 Vt. 400.

Where one enters into land having title, his seizin is not bounded by his actual possession, but is co-extensive with his title. But where he enters without title, his seizin is confined to his possession by metes and bounds. *Jackson v. Porter*, 1 Paine (U. S.), 458; *Cluggage v. Lessee of Duncan*, 1 Serg. & R. (Penn.) 111; *Davidson's Lessee v. Beatty*, 3 Harr. & M'H. (Md.) 621.

A cottage standing in the corner of a meadow (belonging to the lord of the manor), but separated from it and from a high-road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given and the occupier was told that if he was allowed to resume possession it would only be during pleasure. He did resume and keep possession for fifteen years more, and

never paid any rent; it was held, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord. *Doe v. Clark*, 8 Barn. & C. 717.

The general rule is, that after a sale of land, and before a conveyance of a legal title, the vendor is the trustee of the vendee, and the act of limitations will have no operation. But where the vendor disavows the trust, and after having delivered possession to the vendee, makes a lease to a third person in opposition to the title of the vendee, and the lessee enters and holds possession, the jury may presume a disseizin, and if the vendee suffers twenty-one years to elapse without prosecuting his claim, it will be barred by the act of limitations. *Pipher v. Lodge*, 4 Serg. & R. (Pa.) 310.

Where two non-residents held in common an unsettled tract of land, which, without their knowledge, was sold for non-payment of the State taxes, and they afterward made partition by mutual deeds of release and quit-claim, in common form, after which one of them, within the time of redemption, paid the tax to the purchaser at the sheriff's sale, from whom he took a deed of release and quit-claim to himself alone for the whole tract, it was held that this payment and deed inured to the benefit of them both; that the party paying, had his remedy by action against the other for contribution; and that he who had not paid, might still maintain a writ of entry against the other, for his part of the land. *Williams v. Gray*, 3 Greenl. (Me.) 207.

A possession of land, taken under an executory contract for the purchase thereof, is in no sense adverse to the person with whom the contract is made. *Jackson v. Johnson*, 5 Cow. (N. Y.) 74; *Jackson v. Camp*, 1 Cow. (N. Y.) 610; *Botts v. Shield's Heirs*, 3 Litt. (Ky.) 34; *Morris v. Thomas*, 5 Binn. (Penn.) 77; *The Proprietors of Township Number Six v. M'Farland*, 12 Mass. 325; *Higginbottom v. Fishback*, 1 Marsh. (Ky.) 325, 506; *Wilkinson, etc. v. Nichols*, Mon. (Ky.) 36; *Richardson v. Broughton*, 2 Nott & M'C. (S. C.) 417; *Jackson v. Bard*, 4 Johns. (N. Y.) 230; *Bowker v. Walker*, 1 Vt. 18.

Mixed possession.

Where two persons are in possession, the one by right and the other by wrong, it is the possession of him who is in by right. *Chase*, Ch. J., in *Hall v. Gitting's Lessee*, and *Gitting's Lessee v. Hall*, 2 Harr. & J. (Md.) 112; *Mather v. The Ministers of Trinity Church et al.*, 3 Serg. & R. (Penn.) 509; *Davison's Lessee v. Beatty*, 3 Harr. & M'H. (Md.) 621.

There would appear to be no clearer principle of reason and of justice, than this, that if the rightful owner is in the actual occupancy of a part of his tract by himself, or tenant, he is in the constructive and legal possession and seizin of the whole, unless he is disseized by actual occupation and dis-possession. If this were not the law, the possessor by wrong would be more favored than the rightful possessor. Here are two, each in actual possession and occupation of part of a surveyed tract—the owner and an intruder. Who, then, is in possession of the part not occupied by inclosure? either the man who has no right but by disseizin of a part, or he who is in the actual occupancy of a part, and the rightful owner of the whole. In this kind of mixed, constructive possession, the legal seizin is according to the title. Title draws possession to the owner. It remains until he is dispossessed, and then no further than actual dispossession by a trespasser, who can not acquire a constructive possession, which always remains with the title. *Hall v. Powell*, 4 Serg. & R. (Penn.) 465; *Den v. Stephens*, 1 Dev. & B. (N. C.) 5.

In every case of a mixed possession, the legal seizin is according to the title. *Codman v. Winslow*, 10 Mass. 151; *Commonwealth v. Dudley*, *Ibid.* 408.

"Where two are in mixed possession of the same land, one by title and the other by wrong, the law considers him having the title as in possession to the extent of his right." *Cheney v. Ringold*, 2 Harr. & J. (Md.) 87, 94.

"Although there may be a concurrent possession, there can not be a concurrent seizin of lands; and one only being seized, the possession must be adjudged to be in him, because he has the right." *Langdon v. Potter*, 3 Mass. 219.

Naked possession.

Actual possession is *prima facie* evidence of a legal title. *Jackson v. Town*, 4 Cow. (N. Y.) 602.

Possession of land by a party claiming it as his own in fee, is *prima facie* evidence of his ownership and seizin of the inheritance. *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

Possession alone, unexplained by collateral circumstances, evidences no more than the mere fact of present occupation by right; the law will not presume a wrong, and a mere possession is just as consistent with a present interest under a lease for years or for life as in fee. It must depend on the collateral circumstances what is the quality and extent of the interest claimed by the party, and to that extent only will the presumption of law go in his favor. The declarations of the party while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of his possession, adjudge him to be in under a higher right or a larger estate. *Ricard v. Williams*, 7 Wheat. (U. S.) 105.

Where the defendant produces no written title, relying solely on possession, with an assertion of title, he can retain so much only as he has under actual improvement, and has been in possession of for twenty years. *Jackson v. Warford*, 7 Wend. (N. Y.) 62.

In ejectment, possession, accompanied with a claim of ownership in fee, is *prima facie* evidence of such an estate. In such case it is not the possession alone, but that it is accompanied with the claim of the fee, which gives this effect by construction of law to the acts of the parties. *Jackson v. Porter*, 1 Paine (U. S.), 457.

A previous peaceable possession under claim of title, though for less than twenty years, where there has been no abandonment, is sufficient evidence of title against a trespasser, particularly where there has been a descent cast or a devise. *Smoot v. Lecatt*, 1 Stewart (Ala.), 890; *Rochon v. Lecatt*, *Ib.* 609.

But previous possession is not sufficient where there is adverse documentary title. *Hallett v. Eslava*, 2 Stew. (Ala.) 115.

A prior possession is sufficient to entitle a party to recover in an action against a mere intruder or wrongdoer; if, however, there has been delay in bringing the suit, the *animus resatendi* must be shown and the delay satisfactorily accounted for, or the prior possessor will be deemed to have abandoned his claim to the possession. *Whitney v. Wright*, 15 Wend. (N. Y.) 171; see *Sowreer v. McMillan's Heirs*, 4 Dana (Ky.), 461.

The law will never construe a possession tortious unless from necessity.

On the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful. *Ricard v. Williams*, 7 Wheat. (U. S.) 107.

A possession under a quit claim obtained from a naked possessor, without any color or claim of title, and no valuable consideration paid, is not of itself such an adverse possession as renders void a deed from the owner to a *bona fide* purchaser, executed during the continuance of such possession. *Jackson v. Hill*, 5 Wend. (N. Y.) 532.

It is a principle of law, that he who has title to a tract of land, and is in possession of part, is in possession of the whole. A person holding land can not occupy and use every part of his land, nor can he have every part under fence. It is a principle of law, that if two persons are in possession of the same land, the one by title and the other by wrong, it is his possession who has the right. These principles are not only established by the decisions of the court, and acquiesced in, but are founded in justice and general convenience, favor right, and resist wrong and oppression. *Hammond v. Ridgley's Lessee*, 5 Har. & J. (Md.) 245, 264.

By accretions, etc.

Plaintiff in ejectment showed by several witnesses that the land was mere accretion to his own. Defendant offered evidence that plaintiff's land was accretion to that above, and therefore that the land in dispute was accretion to the same land. Also three witnesses testified that a channel formerly separated plaintiff's land from that in dispute. Two of these witnesses were boatmen, and testified that they had taken boats through the channel. Three witnesses for plaintiff denied that there ever was such channel. *Held*, that a judgment for defendant would not be disturbed. *Boyd v. Bethel*, (Ky.) 9 S. W. Rep. 417 (1888).

Boundaries and division fences.

The question of acquiescence arising from the maintenance of a division fence, and occupation in conformity to it, can not be determined by the judge, but must be submitted to the jury under such instructions, as to the law of the case, as the judge thinks proper to give. *Bradstreet v. Pratt*, 17 Wend. (N. Y.) 44.

A feme covert is not bound by the acquiescence of her husband in an erroneous line, dividing lands owned by her from adjoining lands. *Ibid*.

The rule is not invariable, that a crooked fence will be regarded as a boundary fixed and acquiesced in by the owners of adjoining lands, although it has been continued for thirty years. *Lamb v. Coe*, 15 Wend. (N. Y.) 642.

In a dispute relative to the true line between adjoining tracts, the facts that the owner of one of them directed his agent not to sell any lands within the disputed lines, and omitted to pay taxes due on the disputed lands, are not such evidence of acquiescence as will conclude him from subsequently asserting his right to the land. *Van Wyck v. Wright*, 18 Wend. (N. Y.) 158; *Adams v. Rockwell*, 16 Wend. (N. Y.) 285.

A farm is divided into two separate parts, which parts are possessed as distinct farms, for thirty years; on survey, it is ascertained that the owner of one portion has in possession twenty-two acres more than the other; held, in an action of ejectment brought to equalize the possessions, that the

rights of the parties were controlled by the original division and the possessions under it; although the survey had been procured by the defendant. *Jackson v. Long*, 7 Wend. (N. Y.) 170.

Title from a common source.

Where both parties to an action of ejectment claim title under the same third party, it is sufficient to show derivation of title from him; and it is not necessary to trace back to commonwealth. *Luen v. Wilson*, 85 Ky. 503; 3 S. W. Rep. 911 (1887).

In ejectment, when both parties claim to derive title from the same third person, it is *prima facie* sufficient for plaintiff to prove such common derivation of title without proving that such third person had title to the land in controversy. *Low v. Settle*, 32 W. Va. 600; 9 S. E. Rep. 922 (1887).

Plaintiff, in an action of ejectment, claimed title from the original patentee under deeds made in 1797-98, which were never recorded, and under which he, or those under whom he claimed, was never in possession. Defendant claimed under the same patentee by deeds of record, and actual possession under them, for more than thirty years: *Held*, that plaintiff's deeds could not be read as evidence of title against those who had been holding under an adverse title of record, with a possession long enough to ripen into a title. *Davidson v. Morrison*, 86 Ky. 397; 5 S. W. Rep. 871 (1887).

A person coming into possession under a will, can not obtain a right by possession adversely from others claiming under the same will; possession as to them is fiduciary. *Vaux, executor, etc., v. Nesbit, executor, etc.*, 1 McCord Ch. (S. C.) 352, 360.

Where both the plaintiffs and defendants claim under the same right, the plaintiffs are not bound to trace back their title beyond the person holding that right. If there be an adverse right, it lies in the defendant to show it. *Riddle v. Murphy*, 7 Serg. & R. (Penn.) 230.

A defendant in ejectment, who makes title under the same survey as the plaintiff, can not object that it was made on a shifting location, or say anything against it. *Powers v. M'Ferran*, 2 Serg. & R. (Penn.) 44.

Under contracts, deeds, etc.

Land was sold, under a contract for a deed, jointly to plaintiff and defendant's assignor, who paid part of the purchase money and agreed to pay the balance in five years. Plaintiff afterward, without the knowledge of defendant, who was lawfully in possession, paid the balance of the purchase money, and received a deed. *Held*, that he could not maintain ejectment against defendant. *Greenop v. Wilcox* (Mich.), 48 N. W. Rep. 47; Am. Dig. 1891, 1385.

A lease duly executed passes a legal and not an equitable interest, and confers such right of possession that it is error to refuse to admit the same in evidence on the trial of an action for recovering possession of real estate. *Tarpey v. Desert Salt Co.* (Utah), 205; 14 Pac. Rep. 328 (1887).

Where the evidence shows that the deed, absolute on its face, under which plaintiff claims, was in fact given to secure a debt, he has failed to show sufficient interest to maintain the action. *Smith v. Smith*, 80 Cal. 323; 21 Pac. Rep. 4; 22 Pac. Rep. 186, 549 (1889).

It is not indispensable that the plaintiff should show a perfect indefeasible

estate in fee simple, to authorize a recovery against one who can establish no legal right either of property or possession. *Lewis v. Goguette*, 3 Stew. & P. (Ala.) 184.

Where a plaintiff relies on a documentary proof of title, a complete title must be shown; and if a material link be wanting, his documentary proof should be excluded from the jury. *Jenkins v. Noel*, 3 Steward (Ala.) 60.

A possession and claim of land, under an executory contract of purchase, is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance; nor is it such an adverse possession as, if continued for twenty years, will bar an entry, within the statute of limitations; and especially, it is in no sense adverse as to the one with whom the contract is made. *Jackson v. Johnson*, 5 Cow. (N. Y.) 74; *Proprietors of No. Six v. M'Farland*, 12 Mass. 325; *Higginbotham v. Fishback*, 1 Marsh. (Ky.) 506; *Wilkinson, etc., v. Nicholls*, 1 Mon. (Ky.) 46; *Richardson v. Broughton*, 2 Nott & M'Cord (S. C.) 417; *Fowke v. Darnall*, 5 Litt. (Ky.) 318; *Chills v. Bridge's Heirs*, Litt. Sel. Cas. (Ky.) 423; *Kirk v. Smith*, 9 Wheat. (U. S.) 288; *Jackson v. Hotchkiss*, 6 Cow. (N. Y.) 401.

Under eminent domain laws, railroad companies.

Under the general railroad act of New Jersey, § 12, which provides that, on payment of the damages assessed for lands sought to be condemned, the company may "enter on and take possession of said lands," a railroad company may maintain ejectment for land so condemned. *New York, S. & W. R. Co. v. Trimmer* (N. J.), 20 Atl. Rep. 761; Am. Dig. 1891, 1887.

Under public grants, statutes, etc.

Act Cong. July 1, 1862, granting to the Central Pacific Railroad Company a right of way 200 feet wide on each side of its road, was a conclusive legislative determination that so much land was necessary to the use of the road, and gave an exclusive right of possession to the full width, and the company can maintain ejectment therefor against one who occupied without title before the grant. *Southern Pac. Co. v. Burr* (Cal.), 24 Pac. Rep. 1032; *Same v. Meyer*, Id. 1033; Am. Dig. 1891, 1887.

The Atchison Town Company platted a tract of land lying on the west bank of the Missouri river for a town site, indicating on the plat that there was a street along the river, but failing to show the width of the street, or to indicate by figures the dimensions of the lots and blocks fronting thereon. Subsequently, under authority of the Legislature, a highway of a specified width was established along the river, within the limits of the city, and thereafter the city authorized a railroad company to construct and maintain a railroad upon the highway so established, which was done. The ground occupied by the company does not extend beyond the limits of the highway, and the occupancy of the highway by the railroad company has continued from that time until the present. An owner of a lot fronting on the street claimed that, according to the plat and dedication, the railroad company was occupying a portion of his lot, and brought an action to eject it therefrom: *Held*, that, as the railroad was constructed upon a highway or street of the city established as aforesaid, and was laid thereon by authority of the city, the action of ejectment can not be maintained. *Atchison & N. R. Co. v. Manley*, 42 Kan. 577; 22 Pac. Rep. 567 (1889).

Where it appears that plaintiff has made a homestead entry on land according to law, he shows title to the whole tract as against defendant, a mere trespasser in actual possession of all but a few acres, and is entitled to recover, under act Cal. March 23, 1874, providing that every qualified homestead claimant residing on public lands, who shall have made his original entry in accordance with the United States laws, shall from the date of such entry be deemed to have title to and to be in possession of all the land described in such entry, as against trespassers, etc. *Whittaker v. Pendola*, 78 Cal. 296; 20 Pac. Rep. 680 (1889).

Neither the certificate of location issued by the register of the local land office, nor the receiver's receipt, upon final proof, are sufficient evidence of title to support ejectment in the United States courts, though a different rule may prevail in the State courts by statutory provision. *Langdon v. Sherwood*, 124 U. S. 74; 8 S. Ct. 429 (1888).

A certificate of purchase from the State of State lands is not void, though the application and affidavit are defective, and such certificate is sufficient to maintain ejectment. *Cucamonga Fruit & Land Co. v. Moir*, 83 Cal. 101; 22 Pac. Rep. 55; Am. Dig. 1889, 1173.

Ejectment can not be maintained on a State certificate of purchase, which is but a contract for a patent on compliance by the purchaser with its terms, though such certificate is made by the State statutes *prima facie* evidence of title. *Sweatt v. Burton*, 42 Fed. Rep. 285.

The holder under the pre-emption laws of the United States of a cash entry receipt, while it is uncanceled, may maintain ejectment. *Dunbar, J.*, dissenting. *Pierce v. Frace* (Wash.), 26 Pac. Rep. 192; *Orchard v. Alexander*, Id. 196; Am. Dig. 1891, 1387.

Although the grant from the State in the chain of title under which plaintiff in ejectment claims is void, yet, where defendant has shown title out of the State by a valid grant, plaintiff may show title in himself by evidence of possession under color of title. *Gilchrist v. Middleton* (N. C.), 12 S. E. Rep. 85 (1890).

Ejectment may be maintained for land granted by the State to plaintiff and in the possession of defendant. *Blakslee Manuf'g Co. v. Blakslee's Sons' Iron Works*, 59 Hun (N. Y.), 209; 13 N. Y. Sup. 493 (1891).

A State patent executed before, but not delivered until after commencement of a suit in ejectment, takes effect when executed and the legal title is then vested. *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94; 36 N. W. Rep. 837.

Where there is a conflict between two entries and the grants thereon, in the absence of evidence that the senior entry was a special entry, the senior grant founded on the junior entry must be held the superior title. *Bleidorn v. Pilot Mountain Coal & Min. Co.* (Tenn.), 15 S. W. Rep. 737 (1891).

A grant of land by the commonwealth as waste and unappropriated gives the grantee *prima facie* title, which can not be resisted in ejectment by a defendant who has taken possession without color of title, and relies on the fact that the land had been conveyed by an old colonial grant to a third person before the grant by the commonwealth. *Lacy and Hinton, JJ.*, dissenting. *Holloran v. Meisel* (Va.), 13 S. E. Rep. 33; Am. Dig. 18, 1384.

In ejectment the plaintiff based her right to recover possession upon an allegation that on a certain day she "duly made timber culture entry num-

ber 1723," at a local land office, "conformably to the first section of the" timber culture act of 1878, "whereby she became possessed of and entitled to the possession of the land." There was no allegation of ownership in plaintiff: *Held*, that, as against a defendant admitted to be in actual possession, said complaint did not state facts sufficient to constitute a cause of action. *Schultz v. Hadler*, 39 Minn. 13; 39 N. W. Rep. 97 (1888).

Where, under a grant of public lands to aid in the construction of a canal, a selection is made of lands which had been appropriated under a prior grant, and so were not subject to selection under the later one, a subsequent act of Congress confirming the lands to the canal company does not relate back to the date of selection so as to enable that company to maintain ejectment for the lands brought before the passage of the confirming act. *Lake Superior Ship Canal Railway & Iron Co. v. Cunningham*, 44 Fed. Rep. 587; Am. Dig. 1891, 1387.

Under Comp. Laws N. M. § 1570, enacting that "an action of ejectment will lie for the recovery of the possession of any real estate, where the party suing has been wrongfully ousted from the possession thereof, and the possession wrongfully detained," such an action will lie in favor of a plaintiff who has inclosed part of the public domain withdrawn from settlement, and built a house within the inclosure, and been from thence expelled by threats of the defendants, having no better title, provided a proper demand has been made for restoration of the possession. *New Mexico, R. G. & P. R. Co. v. Crouch*, 4 N. M. 141; 13 Pac. Rep. 201 (1887).

One who seeks to recover land included in a swamp land grant, though he has never been in possession, need not show a chain of title from the United States to him. Judicial notice is taken of the acts of Congress granting the swamp land to the State. *Nitche v. Earle*, 117 Ind. 270; 19 N. E. Rep. 749.

A patent for unimproved lands, no part of which was in the possession of any one at the time it issued, gives legal seizin and constructive possession of all the land within the survey. *Peyton v. Stith*, 5 Pet. (U. S.) 485.

As between the holders of general or common land warrants, there is no priority of right to locate; this warrant is a mere authority to the proper officer to make the survey; and the certificate is the inception of title, to which the patent, when issued, relates. *Canal Co. v. Railroad Co.*, 4 Gill & J. (Md.) 1.

Heirs, devisees, etc.

In ejectment by the heirs of a donor in a deed of gift for life against those claiming under the donee for life, brought after the donee's death, where it is shown that the donee entered under the ancestor of the plaintiffs, and as no right or title in the defendants to retain possession after the death of the donee appears, the evidence is sufficient to warrant a verdict for the plaintiffs, without showing any other title in their ancestor than that implied by his execution of the deed of gift, and by the donee's entry and holding under the same. *Yonn v. Pittmann*, 82 Ga. 637; 9 S. E. Rep. 667 (1889).

Where plaintiffs claim as heirs of the former owner, and defendant by a purchase from his estate, plaintiffs may recover, on showing that the sale under which defendant claims was invalid; the rule that plaintiff must recover on the strength of his own title not applying where both parties claim from the same source. *Johnson v. Cobb*, 29 S. C. 372; 7 S. E. Rep. 601 (1888).

Where land, on the death of a minor, descends first to his father and then to his mother for life, a sister of the deceased minor can not sue in ejectment on the death of her father, though the latter devised the land to her, without showing the death of her mother. *Hogan v. Finley*, 52 Ark. 55; 11 S. W. Rep. 1035 (1889).

Ejectment does not lie in behalf of an heir against an administrator to recover possession of land to which the latter is entitled as assets of the estate. *Barco v. Fennel*, 24 Fla. 378; 5 So. Rep. 9 (1888).

C. conveyed mortgaged property to R., her heirs, etc., in trust to receive the income, and apply it to the use of C. for life, and after her death to convey the property to C.'s children and grandchildren: *Held*, that under 1 Rev. St. N. Y. p. 729, § 59, providing that land to which a power in trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the power, R.'s power to convey not having been exercised, the legal title to the land passed to the purchaser at the sale under the mortgage during C.'s life, and C.'s children and grandchildren, after her death, had no such title as would support an action of ejectment. Following *Townshend v. Frommer*, 5 N. Y. Sup. 442; 32 N. Y. St. Rep. 1138; *Townshend v. Loew*, 10 N. Y. Sup. 918; *Same v. McGuire*, Id.

Where there is evidence tending to show that land belonging to a married woman was included in a devise made by her husband to her for life, with remainder over, and that she elected to take the devise, it is error, in an action by the remainderman against her heirs for recovery of the land, to instruct the jury that plaintiff can not recover. *Horton v. Lee*, 99 N. C. 227; 5 S. E. Rep. 404.

Where one takes by descent as a co-heir and tenant in common, he can not show (in ejectment by his co-heir, or one claiming under him) that the ancestor had no title. *Jackson ex dem. Hill v. Streeter*, 5 Cow. (N. Y.) 529.

Where a person dies possessed of land, it is *prima facie* evidence of title in his heirs by descent. *Smith v. Lorillard*, 10 Johns. (N. Y.) 355.

A parent, having a possessory title to lands, dies in possession, leaving several children his heirs at law, who succeed to such possessions. One or more of such heirs who have obtained the exclusive possession of the whole of the premises can not defeat a recovery by their co-heirs of their proportionate parts or shares, by setting up a title acquired from the owners of the land; to avail themselves of such title they must first surrender possession to their co-heirs, and then bring ejectment. But, under a title thus acquired, it seems an adverse possession may be set up in bar of a recovery, when no disabilities exist, if the possession under such title is hostile in its inception to the rights of the claimants and be continued for a sufficient length of time. *Phelan v. Kelly*, 25 Wend. (N. Y.) 389.

Where a person entered into the possession of land belonging to his father-in-law, who promised to give the lot to him and his wife, but subsequently, by will, devised the same to the wife, it was *held*, in action of ejectment brought by the heirs of the wife against the grantee of the husband (he having been in possession thirty-six years, claiming the lot as his own under a conveyance from the husband), that his possession was not adverse, and that a conveyance to the husband from his father-in-law could not be presumed. *Jackson v. French*, 3 Wend. (N. Y.) 337.

Where a grantee under a conveyance from a tenant by the curtesy of a house and lot, goes into possession of the lot and of an alley adjoining the same, which had been used for thirty years by the owners of the lot as appurtenant thereto, continues in possession himself nine years, and then acquires title to the alley from a third person, he can not set up such title as adverse in an action of ejectment brought by the heir to recover the premises as the inheritance of his mother, the action having been brought within twenty years after the termination of the life estate. *Jackson v. Mancius*, 2 Wend. (N. Y.) 357.

Judgments, decrees, tax sales, etc.

The judgment process and deed to a purchaser at sheriff's sale constitute a *prima facie* case, in an action of ejectment brought by him to recover possession of the land sold. *Birkbeck v. Kelly* (Pa.), 9 Atl. Rep. 313.

Plaintiff in ejectment, who bases his title on a sheriff's deed, can not recover, if the execution debtor had no other property, and no homestead was allotted. *Mobley v. Griffin*, 104 N. C. 112; 10 S. E. Rep. 142 (1889).

Plaintiff in ejectment can not recover by simply showing that defendant claimed title under a forfeiture of the land to the State for non-payment of taxes, and that this forfeiture had been subsequently adjudicated absolutely void, without also showing title in himself. *Leonard v. Coleman* (Ark.), 15 S. W. Rep. 14; Am. Dig. 1891, 1384.

Plaintiffs in ejectment showed title under sheriff's deed pursuant to decree of the chancery court against defendants, and that the latter had title at the time the decree was rendered. Defendants introduced conveyances from one of them, through intermediate conveyances, to his children: *Held*, that plaintiff was entitled to recover. *Tatum v. Caston*, 65 Miss. 488; 4 So. Rep. 549.

In ejectment plaintiff offered in evidence a deed from defendant's mother, as a divorced woman, under whom he claimed through mesne conveyances. Defendant claimed as his mother's heir, alleging that the divorce was illegal and the deed by her void. Plaintiff further introduced the record of an equity suit by defendant and his co-heirs against the grantee, and plaintiff as her husband, to set aside the deed as void, on the ground of the illegality of the divorce decree, in which the divorce was found valid, and the bill dismissed: *Held*, that the deed and record of the equity suit were admissible, and, with the subsequent conveyances, showed good title in plaintiff. *Bennethum v. Bowers* (Pa.), 21 Atl. Rep. 520; Am. Dig. 1891, 1385.

The plaintiff claiming under a deed from B, and defendant under a tax deed subsequently issued to B, conveying the land as assessed to an unknown owner, the parties do not claim under a common source of title, and plaintiff, not tracing his title to the government, can not recover, though the tax deed, and the evidence offered in connection with it, are insufficient to prove title in defendant. *Hendricks v. Stone*, 78 Tex. 358; 14 S. W. Rep. 570 (1890).

A decree in favor of the plaintiff, and against the heirs at law, agents, attorneys, and transferees of the grantees named in an outstanding deed from one through whom he claims title, directing all of the defendants to convey to him, and enjoining them from selling or interfering with the lands described, creates a perfect equity therein, on which an action in ejectment may be maintained. *Dodge v. Spiers*, 85 Ga. 585; 11 S. E. Rep. 610.

The plaintiff in ejectment relied on a judgment in partition only, and that being void, it was held that he could not recover, in such case, his undivided share, without deducing a regular title, as if no such judgment of partition had been entered. *Jackson v. Brown*, 3 Johns. (N. Y.) 459.

Where the plaintiff, in an action of ejectment commenced in 1809, showed title by a release, made in 1767, in partition, to eighteen-twentieths of the premises in question, and proved by witnesses, that all the lots in the patent so divided, with which they were acquainted, were held agreeably to that partition, and no outstanding title in the two remaining patentees appearing, *held*, that it might legally be inferred that the lessor had a perfect title to the whole. *Doe v. Campbell*, 10 Johns. (N. Y.) 475.

Under mortgages.

One claiming through a mortgagor who has placed his mortgagee in possession can not maintain ejectment against the mortgagee while the mortgage debt remains unsatisfied, even though an action thereon by the mortgagee is barred by the statute of limitations. *Spect v. Spect*, 88 Cal. 437; 26 Pac. Rep. 203 (1891).

Plaintiff, having obtained a valid title to land by foreclosure, and being in possession of a portion of it, can bring ejectment for the balance, and need not rely on a writ of assistance. *Trope v. Kerns*, 83 Cal. 553; 20 Pac. Rep. 82.

The preponderance of evidence showed that W. and M. signed a note and mortgage jointly; that the lands of both were included in the mortgage; that the mortgagee foreclosed and bought in both tracts; and that he subsequently conveyed them both to plaintiff: *Held*, that the court properly gave plaintiff judgment for possession of both tracts. *Wilmot v. Bordes* (Ky.), 11 S. W. Rep. 86; Am. Dig. 1889, 1171.

The indorsement of a mortgage to a third person by the mortgagee, without words of grant, does not divest the legal title of the mortgagee, so as to enable the indorsee, or one claiming under her, to maintain ejectment for the land. *Robinson v. Cahalan* (Ala.), 8 So. Rep. 415 (1890); Am. Dig. 1891, 1386.

The assignee of a note secured by mortgage can not recover in ejectment where there is no assignment of the mortgage, or transfer of the legal estate by the mortgagee. *Bailey v. Winn* (Mo.), 12 S. W. Rep. 1045.

Where a sale of mortgaged premises is made under foreclosure, the mortgagor having no interest in or title to them, and afterward a judgment for a balance due on the mortgage debt is docketed against the real owner, one claiming under a sale made to satisfy the latter judgment can maintain ejectment against one claiming under the former sale. *Leviston v. Henninger*, 77 Cal. 461; 19 Pac. Rep. 834 (1889).

A purchaser at a foreclosure sale, who does not show whether the sale was advertised, whether it was public or private, by whom made, or the price bid, can not maintain ejectment for the land. *Robinson v. Cahalan* (Ala.), 8 So. Rep. 415; Am. Dig. 1891, 1383.

Where premises were mortgaged in fee, with a proviso for conveyance, if the principal were paid on a given day, and in the meantime that the mortgagor should continue in possession, upon special verdict, it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that inter-

est had or had not been paid by the mortgagor: *Held*, that upon this finding, it must be taken that the occupation was by the permission of the mortgagee; and consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations. *Hall v. Doe*, 5 Barn. & A. 687.

But where a *bona fide* purchaser from a mortgagor entered, without notice of the mortgage (which was not registered till after the commencement of the ejectment suit), and he and those claiming under him, had "been in the continued possession of the premises under a color of title for more than seven years," it was held a sufficient adverse possession to bar the mortgagee, or any claiming under him, from recovering in ejectment. *Baker v. Evans*, 2 N. C. 614.

Municipal corporations, etc.

Where a grantee in a deed from a city and his successors have built intersecting streets, the title to which by the deed remained in the city, without any request from the city, and have erected wharves thereon, the city may recover the streets and wharves in ejectment. Affirming 6 N. Y. S. 628; *City of New York v. Law*, 125 N. Y. 380; 26 N. E. Rep. 471 (1891).

Trustees of a school district, in an action in the nature of ejectment, in which they allege that they are the owners of the land and entitled to possession, may prove either a dedication or adverse possession, or both. *Singelton v. School Dist. (Ky.)*, 10 S. W. Rep. 793; Am. Dig. 1889, 1171.

Oral contracts, gifts, etc.

While an oral gift of land after improvements made on the faith of it, will be enforced in equity, the legal title does not vest in the donee without a decree made with the proper parties in court, so as to enable his heir to eject one claiming under a subsequent warranty deed of the donor. *Howell v. Elsberry*, 79 Ga. 475; 5 S. E. Rep. 96 (1888).

It will constitute adverse possession, for a person to enter upon land claiming title and holding exclusive possession, though done under a parol gift only. *Sumner v. Stevens*, 6 Met. (Mass.) 337.

Trustees, executors, etc.

In 1875 plaintiff orally agreed to sell a tract of land to W. in consideration of his agreement to pay half of a \$400 mortgage thereon and also to pay and have satisfied two judgments against plaintiff. W. went into possession in 1876, and he and his grantees have ever since had full possession, paid taxes, made improvements, etc. He duly paid half of the mortgage, and also paid both the judgments, but at plaintiff's request took an assignment thereof to himself, instead of having them satisfied; but he has always been ready and willing to enter satisfaction. Plaintiff executed and acknowledged a deed to W. for the land, but never delivered it. Held, in ejectment against the tenants of W.'s grantees, that while the plaintiff had the bare legal title, she held it in trust for defendants' lessors, and could not maintain the action. *House v. Howell*, 53 Hun, 638; 6 N. Y. Sup. 799 (1889).

Testator devised his realty to executors to sell and convey for certain purposes, and in a subsequent clause of the will referred to the executors as

trustees of his property. *Held* that, if said executors were in fact trustees of said property, they were so in their representative capacity, and, being invested with the legal title to said property, were competent to maintain ejectment therefor in their capacity as executors. *Landon v. Townshend*, 14 N. Y. Sup. 522; Am. Dig. 1891, 1332.

Plaintiffs in ejectment claimed as executors of a will which devised all testator's property to his wife during her life, with remainder over to his children; and which authorized them "to sell such portions of the real estate as they may think advantageous to dispose of, and to execute all such legal papers as may be necessary to give perfect title to the purchaser." *Held*, that the legal estate vested in the widow and remainder-men, and not in the executors, and they could not maintain the action. *Fredericks v. Cisco*, 72 Md. 393; 20 Atl. Rep. 190; *Same v. Offley*, Id. 191; Am. Dig. 1890, 1178-1179.

In ejectment it appeared that one J. had entered the lands in suit at the State land office on time; that after his death his son W. was appointed administrator *de bonis non*, and as such, in order to avoid the payment of back interest on the purchase price, surrendered the certificates of entry; that by preconcerted arrangement the lands were immediately entered by a friend of W.'s. A short time afterward this friend assigned the certificate of entry to W. individually, and not as administrator. W. and the rest of the family of J., lived on the land for some years. It appeared that W. had no means with which to purchase the land individually, his only income being from the estate of which he was administrator, and that he paid the taxes out of the proceeds of the estate; that he had claimed that the land belonged to the estate, though plaintiff testified that he had represented to him, for the purpose of obtaining credit, that he owned the land. *Held*, that W. did not acquire any interest in the land individually, but his title was that of administrator only. *Reeves v. Barrett* (Ark.), 13 S. W. Rep. 77; Am. Dig. 1890, 1176.

An executor can not maintain ejectment to recover his testator's realty, the will not appearing in the record, and there being no averment that it vested him with title to the realty. *Sturgeon v. Underwood's Ex'r* (Ky.), 2 S. W. Rep. 655 (1887).

Where a will describes property as fronting on C. street, "adjoining O. street, the same being about 30 feet wide in front," and it is not shown exactly what the dimensions of the property are, a person claiming a strip of land as part of the land devised does not show such title as will support ejectment. *Finelite v. Sinnott*, 5 N. Y. Sup. 439.

Where several persons are devisees and tenants in common of land which is sold by two of the executors and devisees, under a power in the will of the deviser, and afterward one of the executors and devisees, who made the sale, purchases from the grantee, and takes a conveyance of the lands to himself, absolutely, the title becomes vested in him solely; and his declarations that he held in common with his co-devisees are sufficient to entitle them to recover a portion of the land as tenants in common with him. *Jackson v. Burtiss*, 14 Johns. (N. Y.) 391.

A trustee holding the legal title, may maintain ejectment even after the trust is satisfied. Although a *cestui que trust*, after the trust is satisfied, may maintain ejectment, that does not deprive the trustee holding the legal

title of his right to maintain such an action. *Hopkins, etc., v. Stephens*, 2 Rand. (Va.) 422.

Upon the death of the trustee pending the ejectment, his devisees are the proper persons to be substituted as plaintiffs. *Hunt v. Crawford*, 3 Penn. 426.

A trustee may recover in ejectment against his *cestui que trust*. *Beach v. Beach*, 14 Vt. 28. A jury will not be directed to presume a conveyance where the trustee could not be authorized to convey, or where it was evidently intended that the legal estate should remain in the trustee. *Ib.*; and see *Mathews v. Ward*, 10 Gill & J. (Md.) 443.

In the case of *The Town of North Hempstead, etc., v. The Town of Hempstead, etc.*, 2 Wend. (N. Y.) 109, 134, it was adjudged, by the unanimous decision of the court for correction of errors, that *cestui que trust*, in the case of a *resulting trust*, may maintain or defend ejectment for the lands which constitute the trust property. In that case, *Savage, Ch. J.*, delivering the opinion of the court said: "There is still another ground on which the title in the town may be sustained. It is fairly inferable, that if any consideration was paid in the first instance, all the inhabitants contributed to it. The grant is to the patentees and their associates, heirs, successors and assigns. If the patentees were trustees, and the *cestui que trust* paid the consideration, there was then a resulting trust in their favor; and such *cestui que trust* have been considered as possessing the equitable estate and the legal also, so far as to enable them to defend or maintain an action of ejectment for lands thus held by them.

A *cestui que trust*, after the purposes of the deed had been satisfied, may maintain ejectment, upon a demise in his own name, although the legal estate is still in the trustee. *Hopkins v. Ward*, 6 Mun. (Va.) 38.

A *cestui que trust* entitled to the enjoyment of the possession of land, may maintain ejectment to recover it in his own name either against a trustee or a stranger. *1 Watts & S. (Penn.) 9*.

Where land is conveyed in trust, with power to sell and apply the proceeds to the payment of a debt, the payment of the debt does not divest the trustee of the legal estate, so that the *cestui que trust* may maintain ejectment. *Moore v. Burnet*, 11 Ohio, 334.

The legal title of a trustee, under a deed of trust, with a power to sell for the payment of the debts of the *cestui que trust*, is not divested by the discharge of the debts, but the trustee may maintain ejectment. *Adam Moore v. The Lessee of Burnet*, 11 Ohio, 334.

A trustee may bring ejectment for lands, and a wrongdoer can not set up the title of the *cestui que trust*. *Hunt v. Crawford*, 3 Penn. 426.

Ejectment may be maintained by the heirs at law of the surviving trustee, the suit not being adverse to the *cestui que trust*. *Crunkleton v. Evert*, 3 Yeates (Penn.), 570.

Where a power is granted to surviving trustees, under a will, to appoint substitutes, they may convey the legal estate to a third person, with the assent of the *cestui que trust*; and such conveyance will authorize the third person to bring ejectment in his own name. *Mitchell v. Stevens*, 1 Aiken, (Vt.) 16.

In North Carolina, it has been held that the grantee of a trustee may maintain ejectment, although the conveyance is not authorized by the trust. *Canoy v. Troutman*, 7 Ired. (N. C.) 155.

An action of ejectment may be maintained by a trustee against his *cestui que trust*, unless, as under certain circumstances may be done, a conveyance of the legal title is presumed. *Mathews v. Ward's Lessee*, 10 Gill & J. (Md.) 443.

An administrator in possession of lands, of which his intestate died seized and possessed, does not hold adversely to the right of his intestate, and can not acquire a title in his own right, by the statute of limitations. *North v. Barnum*, 12 Vt. 205.

An executor entering on lands of the estate of his testator and occupying them, is to be considered as holding them in trust for the heirs or devisees, unless he proves that he held adversely with notice to the heirs or devisees, in which case the proof lies on him to establish the claim at law, on an issue directed. *Ramsay v. Deas' Exr.*, etc., 2 Eq. Rep. (Dees.) 233.

§ 8. Now Generally a Matter of Statutory Regulation.—The interest or title necessary to support the action has now generally become a matter of statutory regulation. As a fair example of these enactments, we quote the statute of Illinois.

Plaintiff's right to possession: No person shall recover in ejectment unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial.¹

How. St. Mich. § 7790, providing that "no person can recover in ejectment unless he has, at the time of commencing the action, a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial," does not deprive one who has had actual possession, under a claim of ownership, of the right to maintain ejectment against a mere intruder. *Shaw v. Hill*, 79 Mich. 86; 44 N. W. Rep. 422.

§ 9. Plaintiff's Title, How Established.—In actions of ejectment the burden of proof is upon the plaintiff to show in himself such a title as will entitle him to the immediate possession of the lands in dispute. The evidence by which this is accomplished will of course vary according to the source from which and the instruments by which the title is derived. If the plaintiff claims as heir, he must show title in his ancestor and establish the fact of his heirship, or if he derives his title by purchase, he may show a grant from the government and title under it in himself by a chain of conveyances. He may show an adverse possession for the period required by law and rely upon such possession as an absolute title in law. Titles from a common source are perhaps the most common of all

¹ Revised Statutes of Illinois, 1845, 205, § 3; Starr & Curtis' Annotated Statutes, 980, § 4.

titles relied upon in actions of ejectment; here the plaintiff must only show title from the common source to enable him to recover, unless the common source is derived by the defendant. Then proof of title in the common source must be made by the plaintiff. Titles derived through judicial proceedings, especially in courts of inferior jurisdiction, present in many instances, questions of great danger. The rule of law which requires in proceedings to divest titles of real property a strict compliance with all legal requirements is here applied in all its force. The methods of establishing the plaintiff's title in these actions both in cases where a privity of estate exists between him and the defendant, and when it does not, will be found fully discussed in appropriate chapters of this work.

§ 10. **Titles Legal and Equitable.**—A title of real estate is defined by Lord Coke to be the means whereby the owner has the just possession of his property.¹ There are several stages or degrees requisite to form a complete title. (1) The lowest and most imperfect degree of title is the mere possession, or actual occupation of the estate without any apparent right to hold or continue such possession. (2) The next stage or degree toward a good and perfect title is the right of possession which may be in one person while the actual possession is in another. The right of possession is either an apparent right which may be defeated by proving a better right, or an actual right which will stand the test against all claimants.² Titles to real estate are required in two ways: by descent and by purchase; by the term descent we understand in law hereditary succession. Descent is the title by which a person upon the death of his ancestor acquires the estate as his heir at law. Every other lawful means of acquiring title to real estate is said to be by purchase, whether it be by deed, by devise, by execution, by prescription, by possession or occupancy, or by escheat.³

Titles are also designated as legal titles and equitable titles. A legal title is one which will be enforced in a court of law, and having which a plaintiff in ejectment will be entitled to the possession of his estate. An equitable title is merely a

¹ Coke on Littleton, 345; 2 Black. Comm. 195.

² Cruise Dig. Tit. 30, s. 1 to 4; 2 Black. Comm. 241; Coke on Littleton,

³ 2 Black. Comm. 197; 2 Bouvier's Law Dic., Title, 589.

right or interest in land, which, not having the properties of a legal estate, but merely a right of which courts of equity will take notice, requires the aid of equity to make it available in an action for the recovery of the possession.

§ 11. **Questions of Local Law—Legal and Equitable Titles.**—The title to real property, whether legal or equitable, and the mode of asserting that title in the courts, depend altogether upon the laws of the States in which such property is situated. Such questions are questions of local law, and the practitioner can rely with safety only upon the statutes and decisions of his own State.¹ In Maryland and in Illinois and some other States the distinction between common law and equity as known to the English law has been constantly pursued in their system of jurisprudence and the action of ejectment is the only mode of trying the title to real property.² Here the plaintiff must show a legal title in himself to the land he claims, and the right of possession under it at the time of the demise laid in his declaration, and in some cases at the time of the trial. He can not support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery. Nor is the defendant required to show title in himself. If the plaintiff makes out a *prima facie* legal title, the defendant may show an older and superior one in a stranger and thus defeat the action.³

In States where there is no court of equity the courts of common law necessarily deal with the equitable interests as if they were legal, and exercise powers over them which are unknown to courts of common law where a separate chancery jurisdiction is established. Cases decided in those States having no courts of equity as contradistinguished from courts of common law can have little or no application to cases where equitable interests are involved in States where courts of equity are distinct from courts of law.⁴

¹Smith's Lessee v. McCann, 65 Black) 342 (1861); Ryder v. Flanders, 30 Mich. 336; Conrad v. Long, (U. S.) 24 How. 398 (1860).

²Wilson v. Inloes, 11 Gill & J. 33 Mich. 78; Harriet v. Childs, 44 (Md.) 358; Hammond v. Inloes, 4 Mich. 457; 7 N. W. Rep. 63; Geiges v. Greiner, 68 Mich. 153; 36 N. W. Md. 140, 173.

³Smith's Lessee v. McCann, 65 Rep. 48 (1888).

U. S. (24 How.) 398 (1860); Singleton v. Touchard, 66 U. S. (1 U. S. (24 How.) 398 (1860).

§ 12. Distinction between Law and Equity Abolished.—Where the plaintiff brought ejectment on a legal title, and gave in evidence a patent of the United States, and the defendant relied upon an equitable defense, the Supreme Court of Missouri said: “Although our present Practice Act abolishes all distinctions between legal and equitable actions, yet a party who seeks relief on a merely equitable title against a legal title must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings. When a party, by his pleadings, sets forth a merely legal title, he can not on the trial be let into the proof of facts, which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief, he must prepare his pleadings with an eye to obtain it, and this must be done, whether he is seeking relief as plaintiff or defendant.”¹

§ 13. Equitable Defenses in Some States.—In several of the States, equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defense to the action of ejectment. The answer or plea in such a case is in the nature of a bill in equity, and should contain all its essential averments. The defendant then becomes, with reference to the matters averred by him, an actor, and seeks, by the equities presented, to estop the plaintiff from prosecuting the action, or to compel a transfer of the title.²

§ 14. The Rule in the Federal Courts.—In the Federal Courts where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by

¹ Maguire v. Vice, 20 Mo. 431; Gib- Wall.) 92 (1871); McGuire v. Rice, 20 son v. Chouteau, 80 U. S. (13 Wall.) Mo. 431; Estrada v. Murphy, 19 Cal. 92 (1871). 272; Weber v. Marshall, 19 Cal. 457.

² Gibson v. Chouteau, 80 U. S. (13 Lestrade v. Barth, 19 Cal. 671.

compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent.¹

But in the action of ejectment, in the Federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title.²

§ 15. U. S. Register's Certificates—Evidence of Equitable Titles.—Certificates of the registers and other officers of the land department of the United States do not convey the legal title of the land to the holder of the certificate; they only evidence an equitable title which may afterward be perfected by the issue of a patent. In the courts of the United States such certificates are not sufficient to authorize a recovery in an action of ejectment, because a recovery in these courts can only be had upon a strict legal title, and this class of certificates pre-supposes the existence of the title in the United States at the time they were given. Something more, as for instance, a patent, is necessary to show that this legal title has been divested.³

§ 16. The Rule in the Federal Courts.—The practice which prevails in many of the States of permitting the action of ejectment to be maintained upon titles not complete or legal in this character in no wise affects the jurisdiction of the courts of the United States. These courts both by the constitution and by acts of Congress are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decisions appropriate to such.⁴ Mr. Justice Grier said: "The hybrid mixture of civil and common law pleadings and practice introduced by State codes can not be transplanted into the courts of the United States."⁵

§ 17. Suits for Possession—The Remedy at Law.—When the plaintiff has a full, adequate and complete remedy at law

¹ Gibson v. Chouteau, 80 U. S. (13 Wall.) 92 (1871); Foster v. Mora, 98 U. S. (8 Otto) 621 (1878); Stephenson v. Smith, 7 Mo. 610; Barry v. Gamble, 8 Mo. 886; Cunningham v. Ashley, 14 How. (U. S.) 377; Lindsey v. Hawes, 2 Black (U. S.) 554; Stark v. Starrs, 6 Wall. (U. S.) 402.

² Gibson v. Chouteau, 80 U. S. (13 Wall.) 92 (1871).

³ Langdon v. Sherwood, 124 U. S. 74.

⁴ Fern v. Holme, 62 U. S. (21 How.) 481 (1858); Sheirburn v. Cordova, 65 U. S. (24 How.) 423 (1860); see R. S. Mo. 1889, § 4636; Hooper v. Scheimer, 64 U. S. (23 How.) 235 (1859).

⁵ Greer v. Mezes, 65 U. S. (24 How.) 268 (1860).

by action of ejectment or a writ of entry he must pursue that remedy. A suit in equity can not be maintained.¹

§ 18. **Adjustment of Equitable Titles in Actions of Ejectment.**—In many States, where the distinctions originally existing between law and equity are blended together into one system, equitable titles may be adjusted in actions for the possession of real property.²

Illustrations.

Defendant in possession under a bond for a deed.

The defendant in an action of ejectment was shown to be in possession under a bond for a deed from the original owner of the land under whom both parties claim. The bond antedated the plaintiff's title. The purchase money was in part unpaid and overdue, but the amount of the purchase price which plaintiff (who had succeeded to the legal title) was entitled to receive from the defendant was undetermined. The defendant without having tendered payment to the plaintiff, alleged in defense both title in herself and her equitable right as purchaser, and prayed, among other things, that a conveyance to her be decreed upon payment of such sum as should be found by the court due to the plaintiff. The answer did not aver a willingness to pay said sum. But it was held that the court should have regarded the equitable claim of the defendant, and have proceeded to an accounting and granting of equitable relief. *Coolbaugh v. Roener*, 32 Minn. 445; 21 N. W. Rep. 472 (1884).

Reformation of the plaintiff's title, etc.

In an action of ejectment both parties claimed title from a common grantor, one Morgan L. Martin, under deeds of conveyance. Martin first conveyed it by a deed to the plaintiff which, after granting all his estate in the land, declared in a subsequent clause that the interest and title intended to be conveyed are only that acquired by a certain sheriff's deed which was in fact an undivided one-half only. He afterward conveyed the remaining half to the defendants. The defendants, upon the theory that the deed in question conveyed by its terms only an undivided half of the premises, and that they themselves had acquired the other undivided half by the subsequent deed from Martin, pleaded merely a general denial. Upon the trial the court held that the plaintiff's deed conveyed the whole estate, this holding having been affirmed by the Supreme Court on the ground that the limitation of the grant was ineffectual, because inserted *after* and not *in* the granting clause and conclusion as to the intention of the parties, although all parties to the conveyance intended that it should embrace only the undivided half and in fact supposed that the deed was drawn so as to effectuate that intention.

¹ *Swampscott & Co. v. Perry*, 120 445; 21 N. W. Rep. 472 (1884); *Green Mass.* 123 (1875); *Jones v. Newhall, Bay, etc., Co., v. Hewett*, 62 Wis. 316; 115 Mass. 244. 21 N. W. Rep. 216 (1884).

² *Coolbaugh v. Roener*, 32 Minn.

The defendants then took a new trial under the statute, and amended their answer by setting up an equitable counter claim for the reformation of the plaintiffs, and so as to make it conform to the intention of the parties appearing on its face and convey an undivided half of the land only. On the second trial it was held that the counter claim was not inconsistent with their previous plea of the general denial, and whether the mistake in the deed was one of law or of fact it might be reformed to accord with the true intention of the parties. *Green Bay, etc., Co. v. Hewitt*, 62 Wis. 316; 21 N. W. Rep. 216 (1884).

§ 19. **Notice to Quit and Demand for Possession.**—One of the essential elements of the plaintiff's case in ejectment is the wrongful possession of the premises in question by the defendant. This possession may be wrongful from the beginning, or it may be rightful in its inception, and become wrongful upon the happening of some event changing its character. As between the parties, one of the most common methods to render that possession wrongful which was not so before is to make a demand for the possession of the premises or serve upon the occupant a notice to quit. In what cases a demand and notice to quit is necessary before bringing an action to recover the possession has been much discussed in England. In the United States the authorities are far from being uniform. In this state of uncertainty, and as the service of the demand for possession or notice to quit is usually attended with so little inconvenience and expense, it would seem to be a mere matter of precaution before bringing the suit.

§ 20. **A Notice to Quit and Demand for Possession, Synonymous Terms in Law—Not Required, When.**—A notice to quit, or demand for possession, which, in law, so far as the action of ejectment is concerned, means the same thing, is never required where there is a want of privity between the parties to the suit with respect to the premises sought to be recovered; in other words, where the parties, respectively, claim under independent, hostile titles, the law of notice to quit, or demand of possession, has no application.¹

Where the plaintiff in ejectment claims title by deeds from the heirs of a person having possession up to his death, claiming to own the premises, and defendant seeks to show an outstanding paramount title in a third person derived through a sale of the premises for taxes, no demand of possession or

¹ *Harland v. Eastman*, 119 Ill. 23 274; *Herrell v. Sizeland*, 81 Ill. 457; (1886); *Gregg v. Van Phul*, 68 U. S. *Prentice v. Wilson*, 14 Ill. 93; *Dean*

notice to quit need be shown by the plaintiff. *Harland v. Eastman*, 119 Ill. 25 (1886).

§ 21. **The General Rule.**—Independent of the question of emblements, the English rule, and the one recognized in many, if not all of the States of the Union in which the common law has not been repealed, appears to be reasonable.

When a person has entered, with a permission from the owner, he is not a wrongdoer, and can not be until he is required by demand to surrender the possession, and refuses.

When an entry is made without consent, it is otherwise, as his possession is wrongful. But where he has license from the owner, he should not be held liable for costs until his possession has become tortious. It may be that when the purpose of the occupancy is not agricultural, that a shorter notice will suffice, than where a question of emblements is involved. Still it would have to be reasonable, so as to afford the occupant reasonable time within which to surrender possession. If the occupant entered without right, or if his occupancy becomes wrongful by disclaiming to hold under the owner, or on a refusal to surrender in a reasonable time after demand of possession, the owner may recover without a notice to quit.¹

Illustrations.

While defendant in ejectment was in possession of land under a lease from one Z., the latter conveyed the land to plaintiff by quit-claim deed, and defendant, being notified of the conveyance, acquiesced therein. Afterward defendant took a lease of the land from a third person: *Held*, that by attorning to a stranger, and repudiating the relationship theretofore existing between himself and plaintiff, defendant forfeited his right to notice to quit. *Lyon v. La Master*, 103 Mo. 612; 15 S. W. Rep. 767.

Plaintiff, owner of a house and lot which he had mortgaged, sold his equity of redemption to defendant. On foreclosure, after condition broken, plaintiff purchased the land, and the mortgagee notified defendant that the sale had taken place, and that plaintiff desired possession. Without further notice, plaintiff brought ejectment. *Held*, that defendant is a tenant by the sufferance, and under Pub. St. R. I. c. 232, § 1, providing that "tenants by sufferance shall quit upon notice in writing by the owner," he is entitled to such notice from the plaintiff himself. *Johnson v. Donaldson* (R. I.), 20 Atl. Rep. 242; Am. Dig. 1891, 2632-2683.

v. Comstock, 32 Ill. 173; *Adams on man*, 24 Hun (N. Y.), 430; *Wood v. Ejectment*, 140; *Livingston v. Tannor*, Wood, 18 Hun (N. Y.), 351. 14 N. Y. 64; *Jackson v. Fuller*, 4 Johns. 1 Walker, J., in C. B. & Q. R. R. Co. (N. Y.). 215; *Eberwine v. Cook*, 74 v. Pres., etc., of Knox College, 34 Ill. Ind. 377; *Waters v. Butler*, 4 Cranch 203 (1864). (C. C. U. S.), 371; *Eysaman v. Eysa-*

A tenant is entitled, in the action of ejectment, to a notice to quit; but this may be superseded, and the tenancy terminated by the denial of the tenant, by word or act, of the title of his landlord. *Wood v. Morton*, 11 Ill. 547.

A tenant in possession who holds under a mortgagor by lease, subsequent to the mortgage, as tenant from year to year, is not entitled to notice to quit. *Den v. Stockton*, 7 Halst. (N. J.) 322. A tenant entitled to notice to quit, will forfeit his right to such notice, by disclaiming the landlord's title. *Den v. Blair*, 3 Green (N. J.), 181.

If a tenant binds himself to quit the demised premises at a definite and fixed period, the landlord may, without notice to him, set him out of possession, if it can be done without breach of the peace, or he may bring ejectment and sue on his covenant for damages. *Rich v. Keyser*, 54 Penn. 86.

A stipulation in a lease that the bare non-payment of rent for ten days will give a right to sue without notice, will be sufficient to dispense with the necessity of a demand or notice before suit. *Eichart v. Bargas*, 12 B. Mon. (Ky.) 464.

To entitle a tenant to notice, there must be a privity either of contract, or of estate, between him and the landlord. *Jackson v. Fuller*, 4 Johns. (N. Y.) 215.

A vendee under a parol agreement is not entitled to notice to quit. *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122.

Where, by an agreement for the sale of lands, the defendant is, on delivery of the possession, to pay part of the purchase money, the residue to be paid at future periods, and the defendant pays part and takes possession under the agreement, the vendor can not maintain ejectment without giving notice to quit. *Jackson v. Rowan*, 9 Johns. (N. Y.) 330.

A tenant for one year holding over is a tenant from year to year, and entitled to notice to quit before ejectment can be brought against him, and a person coming in under him is entitled to the same notice. *Wood v. Salmon*, 4 Wend. (N. Y.) 327.

The owner of land, before bringing his action of ejectment to recover possession, is not bound to give the defendant notice to terminate his tenancy from year to year, unless such defendant holds as the tenant of the plaintiff, or as the tenant of his grantor. But if the tenant from year to year accepts a new lease for a definite period, the prior tenancy is terminated, and no notice is necessary to terminate the new tenancy, prior to the end of the term. *Roosevelt v. Hungate*, 110 Ill. 597 (1884).

And where the person who originally entered sells his improvements to a third person, who takes possession, such third person is entitled to a notice to quit. *Lloyd v. Cozens*, 2 Ashm. (Penn.) 181; *Den v. Blair*, 3 Green. 181; *Morehead v. Watkins*, 5 B. Mon. (Ky.) 228; *Godard v. Railroad Co.*, 2 Rich. (S. C.) 346; *Moore v. Beasley*, 3 Ham. (Ohio) 294; *Den v. Marshall, M. & Y.* (Tenn.) 255; *Jackson v. Salmon*, 4 Wend. (N. Y.) 327; *Hanchet v. Whitney*, 1 Vt. 315; *Logan v. Herron*, 8 S. & R. (Penn.) 459.

There must be a tenancy or existing relation of landlord and tenant. *Jackson v. Deyo*, 3 Johns. (N. Y.) 422; *Jackson v. Aldrich*, 13 Johns. (N. Y.) 106.

A person claiming to hold the land in fee is not entitled to notice to quit. *Jackson v. Deyo*, 3 Johns. (N. Y.) 422.

A servant or bailiff, in possession, is not entitled to notice to quit. *Jackson v. Sample*, 1 Johns. C. (N. Y.) 231.

An application by an adverse possessor to be deemed a tenant of the plaintiff's lessor does not make him a tenant, nor entitle him to notice. *Jackson v. Cuerden*, 2 Johns. C. (N. Y.) 353.

Where defendant entered adversely, a permission by one of the lessors to continue in possession, and his disclaimer to hold adversely, do not make him a tenant so as to entitle him to notice to quit. *Jackson v. Tyler*, 2 Johns. (N. Y.) 444.

Tenant of the heirs is not entitled to notice to quit from a purchaser under a sale by order of the surrogate for a debt of the ancestor. *Jackson v. Robinson*, 4 Wend. (N. Y.) 436.

The vendee who enters under the contract, being in default, is not entitled to notice to quit. *Suffern v. Townsend*, 9 Johns. (N. Y.) 35; *Smith v. Stewart*, 6 Johns. (N. Y.) 46; *Jackson v. Miller*, 7 Cow. (N. Y.) 747; *Whiteside v. Jackson*, 1 Wend. (N. Y.) 418; *Jackson v. Moncrief*, 5 Wend. (N. Y.) 26; *Wright v. Moore*, 21 Wend. (N. Y.) 230; *Powers v. Ingraham*, 3 Barb. (N. Y.) 576.

A person entering upon land with the permission of the owner, as an occupant, without reserving any rent, and with leave to make improvements, will, after eighteen years' possession, be considered a tenant from year to year, and as such, entitled to notice to quit. *Jackson v. Byran*, 1 Johns. (N. Y.) 322.

A entered into possession under an agreement for a conveyance when the whole of the purchase money should be paid, and in the meantime to pay an annual rent of twenty-five bushels of wheat; A, having paid rent for one year at least, becomes a tenant, and is entitled to notice to quit. *Jackson v. Niven*, 10 Johns. (N. Y.) 335.

Where A, a lessee, agreed to sell a lease to B for a certain sum, and indorsed his name on the lease, and delivered it to B, who paid him the purchase money, and agreed to pay the rent in arrear and to become due on the lease, *held*, that this was an agreement for a sale, and that the relation of landlord and tenant did not exist between them, so as to entitle B to a notice to quit. *Jackson v. Kingsley*, 17 Johns. (N. Y.) 158.

The courts of New Jersey hold that ejectment will not lie against a tenant for the non-payment of rent, or a refusal to pay the rent when due, unless there is a clause of re-entry in the lease. If the plaintiff enter by virtue of the clause of re-entry, he must show himself entitled to do so by the terms of the lease, and the absence of sufficient distress on the premises, or excuse himself from the necessity of making or attempting a distress. *Den v. Craig*, 3 Green (N. J.), 192.

Where the lease is by parol for more than one year, and the tenant holds over, it is held that no notice to quit is necessary. *Harrison v. Marshall*, 4 Bibb. (Ky.) 525.

Where rent is payable weekly, or at other stated intervals, in advance, the tenant has the whole of the first day of each succeeding week, or other interval of time, in which to make the payment; and proceedings can not be instituted to remove the tenant until the expiration of such first day. *Sherlock v. Thayer*, 4 Mich. 355.

When fourteen days' notice is necessary to determine a tenancy, a notice to leave "forthwith," not specifying a day certain, and not stating any

cause for giving the notice, is insufficient, although such notice is in fact served fourteen days before the action is brought. *Elliott v. Stone*, 12 Cush. (Mass.) 174.

But a notice to quit, seasonably given by a landlord to his tenant, and correctly stating, either in general terms or by a specific designation of day and date, the time when the tenant should quit the premises, is sufficient, although it does not state the cause of giving it. *Granger v. Brown*, 11 Cush. (Mass.) 191.

A refusal by a tenant to pay rent under a claim by him of right to the reversion, gives an immediate right of entry and action at common law. *Clark v. Everly*, 8 Watts & S. (Pa.) 226.

A vendee of land with a right of possession under the contract, where the contract provides that, on default of payment, the vendor shall have a right to enter immediately and be forever discharged of the contract, is not, on default, entitled to notice to quit. *Dolittle v. Eddy*, 7 Barb. (N. Y.) 75; *Stone v. Sprague*, 20 Barb. (N. Y.) 509.

Notice to quit is necessary, before the landlord can bring ejectment against his tenant from year to year, or at will, unless some act has been done which determines the tenancy; and so, generally, whenever the tenant enters into possession with the assent of the landlord, no definite period being fixed for the continuance of the possession. *Jackson v. Miller*, 7 Cow. (N. Y.) 747.

The grantor of a small lot of land remained in possession of the premises conveyed for twenty-seven years, and no entry or act of ownership on the part of the grantee was shown; it was held, that such possession was not adverse; that nothing but a clear and unequivocal and notorious disclaimer of the title of the grantee, could render the possession, however long continued, adverse. It was further held, that the defendant was not entitled to notice to quit; that the relation of landlord and tenant did not subsist between the grantor and those claiming under the grantee; the more especially, as the nature and situation of the property repelled the presumption of a hiring of the premises by the grantor. *Jackson v. Burton*, 1 Wend. (N. Y.) 341.

Where, by the agreement for the sale of lands, the defendant is, on delivery of the possession, to pay part of the purchase money, the residue to be paid at future periods, and the defendant pays part, and takes possession under the agreement, the vendor can not maintain ejectment without giving notice to quit. *Jackson v. Rowan*, 9 Johns. (N. Y.) 330; *Den v. M'Shane*, 1 Green (N. J.) 95.

An occupant, under an executory contract, is a *quasi* tenant at will; and though he could not be evicted without a previous demand of the possession, he is not entitled to six months' notice to quit. *Venable v. M'Donald*, 4 Dana (Ky.), 337; *Den v. Webster*, 10 Yerg. (Tenn.) 513.

A rector, in December, 1816, granted, bargained, sold and demised the rectory and all the glebe lands, tithes, etc., to a trustee for securing an annuity for a term of years, if he, the rector, should so long live. This conveyance having been made after the passing of the 43 G. 3, c. 84, and before the passing of 57 G. 3, c. 99, was held to be a valid conveyance, and to pass the legal estate to the trustee. The rector succeeded to the rectory, upon the death of the former incumbent, in April, 1816. A and B were

then in the possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession till after December, 1816, when the rector conveyed them to the trustee for securing the annuity; held, that the latter could not maintain an ejectment against A and B without giving them a notice to quit. *Doe v. Somerville*, 6 B. & C. 126.

The notice required for the determination of an estate at will, where the rent reserved is payable at periods of less than three months, must not only be as long as the period between the days of payment, but must terminate at the expiration of such an interval. *Prescott v. Elm*, 7 Cush. (Mass.) 346; *Currier v. Barker*, 2 Gray (Mass.), 224.

Where premises were leased for the term of one year from the first day of March, 1855, the court held that the tenancy determined on the first day of March, 1856; and that under the statute the tenant was not entitled to notice to quit. *Layman v. Throp*, 11 Ind. 358; *McClain v. Doe*, 5 Ind. 237; *Myerson v. Neff*, 5 Ind. 523.

The fact that a landlord has given his tenant notice to quit, where, from the character of the tenancy, no notice was required, will not commit the landlord as to the nature of the term; but he may repudiate the notice, and place himself upon the true ground. *Secor v. Pestana*, 37 Ill. 525.

Where a lease is made to run from the first day of April for one year, the courts hold that the first day of April is not to be excluded, but the term commences on that day; and the lease expires on the 31st day of March of the year following, although the lessee has the right to remain in possession all of that day; he has no right to remain longer. A notice to quit on the 31st day of March, is therefore good. *Fox v. Nathans*, 32 Conn. 348.

A landlord entered into an agreement with a tenant, on January 2, 1815, to grant the latter a lease for eight years, of certain premises, the agreement to take effect from October 10, 1814, from which time tenant had been in possession, yielding 2s. 6d. yearly, and in case he held over after the term, he was to pay 10s. per diem, for every day he retained possession. The lease was never granted. At the expiration of the term, the tenant held over after having been served with a nine months' notice to quit at the end of the year for which he held, which should first happen after the expiration of half a year from the date of the notice. He was then served with a written demand of possession, and the same paper notified to him, that if he did not yield quiet possession, an action of ejectment would be brought: held, (1) that the tenant was not to be tried as a tenant from year to year; and (2) that the demand of possession was sufficient notice within 1 Geo. 4, c. 37, so as to entitle the plaintiff to the benefit of the undertaking, and security required by that statute. - *Doe v. Roe*, 2 Dowl. & Ry. 565.

An agreement was made between A and B that the former should sell certain premises to B, if it turned out that he had a title to them, and that B should have the possession from the date of that agreement. It was held, that an ejectment could not be maintained by A against B, without a demand of possession, although the object of the action was to try the title to the premises. *Doe v. Jackson*, 1 B. & C. 448.

If the defendant be a tenant of the plaintiff by any compact or assent amounting to a leasing or an occupation subject to rent, the plaintiff can not bring ejectment without giving the tenant notice to quit; but any disclaimer of the relation of landlord and tenant made prior to the demise,

dispenses with the notice; a disclaimer subsequent to the demise may be considered evidence to dispense with a tenancy. *Horsey's Lessee v. Horsey*, 4 Harr. (Del.) 517.

§ 22. **A Matter of Statutory Regulation.**—As between persons sustaining the relation of landlord and tenant, the termination of the holding, so as to lay the foundation for an action of ejectment by a demand for possession or notice to quit is now generally regulated by statutory enactments. As an illustration we quote the statute of Illinois:

“In all cases of tenancy from year to year, sixty days' notice, in writing, shall be sufficient to terminate the tenancy at the end of the year.”

“In all cases of tenancy by the month or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by thirty days' notice in writing, and to maintain an action of forcible detainer or ejectment.”

“Where default is made in any of the terms of a lease, it shall not be necessary to give more than ten days' notice to quit or of the termination of such tenancy, and the same may be terminated on giving such notice to quit at any time after such default in any of the terms of such lease.”¹

§ 23. **Under the English Law.**—Before a person entitled to real property can support an action of ejectment or trespass against a person for retaining possession, he must be prepared at common law to prove that the possession is adverse; therefore, if the occupier has been permitted to occupy as a tenant, that permission must, in the case of a tenancy, be determined by a notice to quit, and if there be no tenancy but at sufferance, then a formal demand of possession should be made, so as to determine the owner's permission, and which, for the sake of certainty, should be in writing as well as verbal, and may be made as in the subscribed form; and the lord of a manor can not sustain ejectment for an inclosure on his waste, made with his knowledge or acquiescence, without proving a previous demand. But in general a mortgagee need not serve or give notice or demand, verbal or written, before an ejectment against the mortgagor, or a person who came into possession under him since the mortgage,² and who has not been acknowledged tenant by the mortgagee. Nor is any notice or demand necessary when a person holds over after the expiration of a lease or of a notice to quit, without any fresh

¹ R. S. Ill., 1889, 877, §§ 5, 6, 9. sey, 8 Bar. & Cres. 767; *Doe v. Giles*, 5

² 1 Chitty's Practice, 570, 571; Thun- Bing. 421; 2 Moore & P. 749.
der v. Belcher, 3 East, 449; *Doe v. Mai-*

agreement authorizing him to retain possession; and a mere negotiation for a lease after a person has assumed or retained possession, will not render a notice or demand necessary; nor is a notice or demand requisite when a vendee has been let into possession without a conveyance, and has neglected to pay installments according to stipulation.¹

Forms under the English Law.

Demand of possession by landlord or his agent.

Sir,—I do hereby, (or, if given by an agent, “I do hereby, as the agent of and for A. B., your landlord, and on his behalf,”) according to the form of the statute in such case made and provided, demand and require you forthwith to quit and deliver up to me (or, “to the said A. B.”) the possession of the dwelling-house (or, “farm, land and premises,”) with the appurtenances, situate and being in the parish of —, in the county of —, and which were held by you as tenant thereof under a lease (or, “agreement in writing,”) bearing date, &c. (*date of lease or agreement*) for the term of — years, which expire on the — day of — last, (or, “from year to year, and which tenancy was determined by me,” or, “by the said A. B.” or, “by you,”) by a regular notice to quit on the — day of — last. Dated, &c.

Yours, &c.

A. B. (or, “E. F., agent for the said A. B.”)

To Mr. C. D., tenant in possession.

Entry upon and demand of possession of land, &c., to determine any permission to occupy or a mere tenancy strictly at will or sufferance, or to prevent the operation of the statute of limitations.

I (or, “I, E. F., as the attorney and agent of and for A. B., and by him duly appointed and authorized,”) do now make this entry into and upon this house and land and premises, in the name of the whole of the buildings, lands, tenements, hereditaments, and premises thereunto belonging, or therewith used, occupied, or enjoyed, with intent henceforth to resume and obtain, and keep the actual possession thereof for my own use and benefit (or, “for the use and benefit of the said A. B.”) and to put an end to all and every subsisting tenancies or permissions to hold or occupy the same tenements, hereditaments, or premises, or any thereof, if any such there be or have been, and also to interrupt and prevent the operation of any statute or statutes of limitations, that otherwise might or would prejudice or affect my claim to the said tenements, hereditaments, and premises, or any part thereof; and I do now demand and require you, G. H. (the present occupier,) and all other persons and person whatsoever, immediately to give up to me the full, entire, and peaceable possession of these and all other the said tenements, hereditaments, and premises, with the appurtenances, or in

¹ 1 Chitty's Practice, 572; Doe v. Lawder, 1 Stark. R. 308; Doe v. Sayer, 3 Camp. 8.

default thereof, I shall forthwith pursue such proceedings as I shall or may be advised to adopt in the premises. Dated, &c.

Yours, &c. A. B.

To Mr. G. H. (the occupier) and all others whom the same doth or shall or may concern.

1 Chitty's Practice, Am. Ed. 1834, 572.

§ 24. **Landlord and Tenant—Vendor and Vendee.**—Notice to quit is generally necessary where the relation of landlord and tenant exists, and no definite period is fixed for the termination of the estate; but where a lease is to expire at a certain time a notice to quit is not necessary in order to recover in ejectment, because the holding over would be wrongful after the duration of the estate was fixed and well known to lessor and lessee.¹ In an executory contract of purchase the possession is originally rightful and until the party in possession is called upon to restore it, he can not be ejected without a demand or notice to quit. But the vendee may forfeit his right of possession and to a demand and notice. If he fails to comply with the terms of the sale, his possession afterward is tortious, and there is an immediate right of action against him.²

It would be an idle ceremony to demand possession, when to a previous demand for the money due on the contract of purchase, the vendee refused to respond.³

§ 25. **Vendor and Vendee—Executory Contract.**—As a general principle, where a party acquires the possession of land under an executory contract of purchase, the vendor can not maintain ejectment against him, until he has demanded possession, or given him notice to quit. The possession of the purchaser being lawful in its inception, does not become wrongful until he is called upon to restore it.⁴ But the right

¹ Stopplecamp v. Mangeott, 42 v. Stokes, 8 East, 358; Ackland v. Calif. 316; Brandenburg v. Ruthman, Tutley, 9 A. & E. 879.

7 Colo. 323; Schreiber v. Chicago, etc., R. Co., 115 Ill. 340; Shriver v. Gregg v. Von Phul, 68 U. S. (1 Klingenburg, 67 Iowa, 544; Alcorn Wall.) 274; Baker v. Gittings, 16 v. Morgan, 77 Ind. 184; Hamit v. Ohio, 489.

Laurence, 2 A. K. Marsh. (Ky.) 366; ³ Gregg v. Von Phul, 68 U. S. Lithgow v. Moody, 35 Me. 214; Hulet (1 Wall.) 274 (1864).

v. Nugent, 71 Mo. 131; Smith v. ⁴ Prentice v. Wilson, 14 Ill. 91 Litchfield, 51 N. Y. 539; McGregor (1852); Right v. Beard, 13 East, 210; v. Rawle, 57 Pa. St. 184; Williams v. Doe v. Jackson, 1 Barn. & Cres. 448; Bennett, 4 Ired. (N. C.), 122; Ship- 1 Sugden on Vendors, 249.
man v. Mitchell, 64 Tex. 174; Cobb

to retain possession may be forfeited by the purchaser. If he repudiates the contract under which he obtained the possession, or fails to comply with its terms, the seller is at liberty to treat the contract as rescinded, and regain the possession by an action of ejectment. In such case, neither a demand of possession nor a notice to quit, is necessary.¹

§ 26. **Vendor and Vendee—Contract of Purchase.**—In this country it is generally held that a vendee is not entitled to notice to quit, though he enters lawfully into possession of the land by the consent of the vendor; ejectment may be maintained against him upon his failure to perform his part of the contract under which he enters, on showing notice from the vendor that the contract is at an end.²

In England, however, the rule is different in relation to a purchaser. There he seems to be entitled to notice; Lord Ellenborough said, that, after the lessor had put the defendant into possession, he could not, without a demand of possession, and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat him as a wrongdoer and trespasser, as he must assume to do by the action of ejectment.³

§ 27. **Mortgagor in Possession after Default—Notice to Quit.**—The question, is the mortgagor, being in possession, entitled to notice to quit before suit brought, does not seem to have been authoritatively determined, although the subject has been frequently discussed. He has been called a tenant at will, a *quasi* tenant at will, a tenant at sufferance, an agent, receiver, and yet he seems to be wanting in some of the essentials of each.⁴

In a New York case, Livingston, J., who delivered the opinion, said that it was not deemed necessary to ascertain what relation the mortgagor held to the mortgagee, whether as a tenant at sufferance or at will, or from year to year; that as a

¹ Prentice v. Wilson, 14 Ill. 91 (1852); Jackson v. Miller, 7 Cow. (N. Y.) 747; Whiteside v. Jackson, 1 Wend. (N. Y.) 418; Baker v. Lessee of Gittings, 16 Ohio, 485. Wend. (N. Y.) 418; Wright v. Moore, 21 Wend. (N. Y.) 230; Jackson v. Miller, 7 Cow. (N. Y.) 747; 6 Wend. (N. Y.) 228; Maynard's Lessee v. Cable, Wright (Ohio), 18.

² Jackson v. Moncrief, 5 Wend. (N. Y.) 26; Whiteside v. Jackson, 1 ³ Right v. Beard, 13 East, 210.

⁴ Carroll v. Ballance, 26 Ill. 18 (1861).

rule of practice the court would require, in such cases, a notice of six months.¹

The doctrine in England is, as we find it declared by Lord Mansfield, that when mortgagor is left in possession, the true inference to be drawn is, an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit and he is not even entitled to reap the crop as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases.² And Lord Ellenborough held that a mortgagor was no more than a tenant at sufferance and not entitled to notice.³ In most of the American courts this doctrine is recognized.⁴

One good criterion of the nature of a mortgagor's interest is laid down by Lord Ellenborough in the case cited⁵ and which has been recognized in some American courts.⁶ It is that the mortgagor can not take the emblements, even when expelled by the mortgagee, as a tenant at will could. This being so he can not be regarded as a tenant at will, and the decisions which put his possession on that footing can not be correct, for although the mortgagor holds the premises by the sufferance of the mortgagee, yet he does not hold of him, and as the peculiar relation of tenure is not created, the mortgagor can not properly be described as a tenant at will.⁷

§ 28. **The Law Stated by Breese, J.**—"We are inclined to the opinion that there is really no tenancy of any kind created by the mortgage. The mortgagee may consider the mortgagor as his tenant for some purposes, or a trespasser or person holding without right. It is an inference from the facts and circumstances. He is not such a tenant as is entitled to a notice to quit."⁸

¹ Jackson v. Laughhead, 2 Johns. Bearse, 2 Greenl. (Me.) 132; Shute v. (N. Y.) 75; Bennett v. Lamson, 17 Greaves, 7 Blackf. (Ind.) 1; Lyman v. Johns. (N. Y.) 300. Mower, 6 Vt. 345; Carroll v. Ballance

² Keech, Lessee, etc., v. Hall, Doug. 26 Ill. 17 (1861).
21; Carroll v. Ballance, 26 Ill. 18 (1861).

³ Thunder v. Belcher, 3 East, 449; Carroll v. Ballance, 26 Ill. 18 (1861).

⁴ Brown v. Cram, 1 N. H. 169; Newell v. Davis, 3 Mass. 152; Colman v. Packard, 16 Mass. 39; Reed v. Davis, 4 Pick. Mass. 216; Blancy v.

⁵ Keech, etc., v. Hall, Doug. 21.

⁶ Jones v. Thomas, 8 Black, 428.

⁷ Mayor v. Fletcher, 14 Pick. (Mass.) 530.

⁸ Breese, J., in Carroll v. Ballance, 26 Ill. 19 (1861); Prentice v. Wilson, 14 Ill. 91; see Chapter V.

§ 29. **The General Rule.**—The relation of mortgagor and mortgagee is somewhat similar to that of landlord and tenant, but the mortgagor is not in the position of a yearly tenant to his mortgagee. A mortgagee may maintain ejectment against the mortgagor, after the forfeiture of the mortgage, without any previous notice to quit, or demand of possession. This is the rule in England, and in some of the States. But in other States the mortgagor is entitled to notice to quit before an action of ejectment by the mortgagee. In other States ejectment will not lie in case of mortgages at all.¹

§ 30. **Tenants at Sufferance.**—A tenant at sufferance is one who comes into possession of lands, tenements or hereditaments by a lawful demise or title and wrongfully continues in possession or holds over after his term is ended.² At common law he was not entitled to notice to quit³ for he stands in no privity to his landlord and has no estate in the land in question which he can transfer to another.⁴ The rules of law applicable to tenants at sufferance are well settled, but it is often difficult to determine who is a tenant of this description.

At common law a tenancy at sufferance might be determined by mere entry. No demand of possession, or other notice, was necessary. *Jackson v. Parkhurst*, 5 Johns. (N. Y.) 128; *Jackson v. McLeod*, 12 Johns. (N. Y.) 182.

A landlord, by his attorney, executed a lease to his tenant for three years, and after the expiration of the term, the tenant applied to the attorney of the landlord to know if he was authorized by the landlord to enter into a new agreement. The attorney replied he was not, but that the tenant might remain in possession of the premises until he heard from the landlord; it was held that the tenant, after the expiration of the original term, was a mere tenant at sufferance, and was not entitled to notice to quit, previous to an action of ejectment. *Jackson v. Parkhurst*, 5 Johns. (N. Y.) 128.

A tenancy at will is determined by the death of the lessor, and the lessee becomes tenant at sufferance; he is not entitled to notice to quit. In all cases of a tenant at sufferance, the owner of the fee may maintain his action of ejectment without notice. *Reed v. Reed*, 48 Me. 388.

¹ *Wilson v. Hooper*, 13 Vt. 653; ³ *Kunzie v. Wixom*, 39 Mich. 384; *Lyman v. Mower*, 6 Vt. 345; *Fuller Reckhow v. Schanck*, 43 N. Y. 448; *v. Wadsworth*, 2 Ired. (N. C.) 263; *Hauxhurst v. Lobree*, 38 Calif. 563; *Williams v. Bennett*, 4 Ired. (N. C.) Benfey v. Congdon, 40 Mich. 283. 122; *Doe v. Giles*, 5 Bing. 421; 2 ⁴ *Coomler v. Hefner*, 86 Ind. 108; *M. & P.* 749; *Jackson v. Laughhead*, *Godfrey v. Walker*, 42 Ga. 562; 2 Johns. (N. Y.) 75; *Jackson v. Proctor v. Tows*, 115 Ill. 138; *Abeel v. Hubbell*, 52 Mich. 37; *Mendall v. Green*, 4 Ib. 183.

² *Bouvier's Law Dic.*, title, Tenant; *Hall*, 13 Bush (Ky.), 232. *Webster Dic.*, title, Sufferance; 2 *Am. & Eng. Ency.* 668.

§ 31. **Tenants At Will.**—A tenant at will is one who holds lands at the will of the owner. The tenancy is subject to the will of either party, but as a rule a demand for possession or a notice to quit is necessary before the action of ejectment can be sustained.¹ The notice is generally regulated by statute.

Tenancies at will may be created without writing, and are not within the provisions of the act regulating conveyances. A lease made by an agent in his own name is void, and the tenant entering under such a lease is a tenant at will, and as such is entitled to a notice to quit before an action of ejectment will lie against him. *Murray v. Armstrong*, 11 Mo. 209.

A person in possession of land with the consent of the owner under a contract of purchase which is not completed, is a mere tenant at will, and such tenancy determines by the death of the lessor. *Manchester v. Dodridge*, 3 Ind. 360.

§ 32. **Tenancy at Will, When It Arises.**—This kind of tenancy arises when the party is in possession of the premises with the privity and consent of the owner, no express tenancy having been created, and no act having been done by the owner impliedly acknowledging such party as his tenant; as where he has been let into possession pending a treaty for a purchase or a lease, or under a lease or agreement for a lease, which is void, or as the minister of a dissenting congregation, or when, having been tenant for a term which has expired, he continues in possession, negotiating for a new one. In all these cases and the like, it is held that the party, being lawfully in possession, can not be ejected until such possession is determined either by demand of possession, breaking off the treaty, or otherwise, and the party is called a tenant at will; but in any of these cases, if the landlord receives rent while the party is so in possession, or does any other act amounting to an acknowledgment of a subsisting tenancy, a tenancy from year to year will be created.²

¹ *Coomler v. Hefner*, 86 Ind. 108; 47; *Tyler on Ejectment*, 214; *Adams Larned v. Hudson*, 60 N. Y. 102; on *Ejectment*, 107; *Roe v. Street*, 4 *Bennett v. Robinson*, 27 Mich. 26; *Nev. & Man.* 42; *Daniels v. Davidson*, 16 Ves. Jr. 252; *Doe v. Pullen*, 2 Bing. N. C. 749; *Doe v. Bell*, 5 Term 471; *Clayton v. Blakey*, 8 Ib. 3; *Thunder v. Belcher*, 3 East, 449; *Doe v. Browne*, Ib. 165; *Doe v. Price*, 9 Bing. 356; *Doe v. Turner*, 7 Mees. & W. 226; 9 Ib. 643; *Doe v. Thomson*, 1 *Nev. & P.* 215.

² *Chamberlain v. Pratt*, 33 N. Y.

The seizin of lands belonging to the Indian tribes, is in the sovereign, and the Indians are mere occupants. A purchaser from them can acquire only the Indian title; and they may resume it, and make a different disposition of it. An occupant under an Indian grant, the Indians having afterward resumed the title, and granted it to the crown, was held to be a tenant at will of the king, whose occupancy no length of time could ripen into a title by adverse possession. *Jackson v. Porter*, 1 Paine (N. Y.), 448; *Cocke's Lessee v. Dotson*, 1 Tenn. 169; *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 571; *Fletcher v. Peck*, 6 Cranch (U. S.) 142; *Jackson v. Hudson*, 3 Johns. (N. Y.) 384.

§ 3. The Necessity of Notice—The Law Stated by Washburn.—The necessity of giving notice in order to determine a tenancy at will, which has become so general, has reduced the class of estates held strictly at will, to comparatively few in number. They still exist in certain cases, and form a second division of this subject. They are divided into two classes: such as are made so by express agreement of the parties, and such as are created by implication of law. Because of the uncertainty of the rule requiring reasonable notice in order to determine a parol lease, and from the circumstance that rent was generally measured by the year, courts early adopted a rule, which has been extensively followed in this country, that a general tenancy by a parol lease, when rent is to be paid, shall be considered as a lease for a year, which can only be determined by a notice for the time of at least six months, terminating at the expiration of the year. And if the tenant is allowed to hold without such notice, into a second year, it will be considered as a holding for such second year, and so on. So that the common mode of designating such estates by parol, is an estate from year to year, to continue till either party gives the other the requisite notice to determine it.¹

At common law, a tenancy at will would be terminated by a sale of the premises by the owner; but in Michigan it is held that a notice to quit must be served notwithstanding a sale. *Hogsett v. Ellis*, 17 Mich. 351.

In order to terminate a lease at will by a notice under the statute, where the rent is payable monthly, a month's notice must be given, which must either specify the exact day on which the next month expires, or state that the tenancy will be terminated in one month from the next rent day. *Sanford v. Harvey*, 11 Cush. (Mass.) 93; *Granger v. Brown*, 11 Cush. (Mass.) 191.

¹ 1 Wash. on Real Prop. 510, § 1, 159; *Ridgeley v. Stillwell*, 28 Mo. sub. 22, and pp. 519, 520, § 2, sub. 1; 400; *Patton v. Axley*, 4 Jones L. see also *Lesley v. Randolph*, 4 Rawle (N. C.) 440. (Pa.) 123; *Right v. Darby*, 1 Term R.

A tenant of a house, at a fixed compensation for his labor by the month, and house furnished him, determines his tenancy by failing to work, and is not entitled to notice to quit. The right of occupancy is held to be incident to the contract of hire, and ceases whenever, by mutual consent, or by the fault of the tenant, the services themselves cease. From that time the tenant can no more claim the right to occupy the house, than he could claim any other portion of his hire; and he would be in no better condition than a strict tenant at will, who has, by his own act, terminated the tenancy, and would, at most, be entitled only to a reasonable time for removing from the house. *McGee v. Gibson*, 1 B. Mon. (Ky.) 105.

Where a notice to quit and deliver up the possession in seven days from the service thereof of premises held under a tenancy at will, with weekly payments of rent, is served by leaving the same at the tenant's house upon a rent day, he being absent at the time and not returning for some days, it was held, the tenancy will not thereby be determined upon the next rent day. *Hultain v. Munigle*, 6 Allen (Mass.), 220.

When premises are let at a fixed monthly rent, with the understanding that the tenant shall give up possession whenever the landlord may require them for his own use, the letting creates a tenancy at will which can only be terminated by a full month's notice to quit at the end of one of the regular monthly periods. *Woodrow v. Michael*, 13 Mich. 187.

The estate of a tenant at will, who occupies under an agreement to pay rent monthly, on the first day of each month, may be determined by a written notice, given on the first day of a month, and directing him to quit and deliver up the premises on the first day of the next month, although the monthly terms began on the first day of each month. *Walker v. Sharpe*, 14 Allen (Mass.), 43.

§ 34. **Tenants from Year to Year.**—A tenant from year to year is one who holds lands or tenements under a demise from another in which no certain time is mentioned, but an annual rent has been reserved. The tenancy is a general letting without limitation as to time,¹ so when a person is let into possession as a tenant without any agreement as to time, the presumption is that he is a tenant from year to year; but this presumption may be overcome by proof.²

The difference between a tenant from year to year and a tenant for years is rather a distinction in words than in substance.³

¹ *Ridgely v. Stillwell*, 25 Mo. 570; *Gartside v. Outley*, 58 Ill. 210; *Snow v. Clark*, 80 Ind. 57; *Judd v. Fairs*, 53 Mich. 518; *Young v. Young*, 36 Me. 133; *Bell v. Norris*, 79 Ky. 48; *Leavitt v. Leavitt*, 74 N. H. 329; *Jackson v. Wilsey*, 9 Johns. (N. Y.) 267; *Dunn v. Rothermel*, 112 Pa. St. 272; *Beowdett v. Pierce*, 50 Vt. 212; *Garrett v. Clark*, 5 Oreg. 464.

² *Sheldon v. Davy*, 42 Vt. 637; *Shipman v. Mitchel*, 64 Tex. 174; *Secor v. Pestana*, 37 Ill. 525; *Dubuque v. Miller*, 11 Iowa, 538; *Grant v. White*, 42 Mo. 285.

³ *Woodf. L. & T.* 163; *Bouvier's Law Dic.*, title Tenant.

In all cases of tenancies from year to year, and the like, the tenant is entitled to a reasonable notice to quit before a recovery can be had in ejectment.¹ What is a reasonable notice in these cases is usually a question for the courts in the absence of statutory enactments.²

In case of a tenancy from year to year, the tenant can not quit at pleasure, without notice, and deprive the landlord of accruing rent. Neither can the tenant in such a case be ejected without a notice to quit as at common law. *Hall v. Wadsworth*, 28 Vt. 410.

The defendant obtained permission of the owner of premises to build a hovel and stable a colt upon the same, the owner, by way of compensation, to have the manure. Subsequently defendant enlarged the hovel, and moved his family into it with the owner's knowledge. In an action of ejectment it was held that the defendant in occupying the hovel as a dwelling, put an end to the contract, if the plaintiff had so elected, but that by his acquiescence therein and afterward receiving the stipulated compensation, he confirmed the act. In April, the plaintiff, without stating any time, requested defendant to remove the building and vacate the premises; and on July 10th notified him to quit at once, and on July 14th brought ejectment. It was held that the occupancy had become a tenancy from year to year, and that the notice was not reasonable. *Boudette v. Pierce*, 50 Vt. 212.

Where a tenant whose term has expired, instead of quitting the premises remains in possession, he is a wrongdoer, and may be treated as such by his landlord; and the landlord may immediately maintain an ejectment to recover the possession without giving a notice to quit. But by consent, of course, his tenancy may be continued, and if such continuance, by consent, be without any fixed limit, he becomes a tenant from year to year. The mere unbroken silence and inaction of the owner, will not, however, improve or enlarge the character of the tenant's possession. *Den v. Adams*, 7 Halst. (N. J.) 99.

In Vermont, in most respects the action of ejectment, as between landlord and tenant, seems to be governed by the rules of the common law. Notice to quit, in case of tenancy from year to year, must be given six calendar months before the year expires, and must point to the time when the tenant must quit, or ejectment can not be maintained. *Henchett v. Whitney*, 1 Vt. 311.

In Connecticut, the English rule, under which a tenant from year to year is entitled to six months' notice to quit before the landlord can bring eject-

¹ *Coomler v. Hefner*, 86 Ind. 108; 317; *Dunn v. Rothermel*, 112 Pa. St. Thompson v. Maberly, 2 Camp. 573; 272; *Stopplecamp v. Mageot*, 42 Cal. Bedford v. McElherron, 2 S. & R. 316; *Doe v. Smaridge*, 7 Q. B. 957; (Penn.) 49; *Doe v. Morse*, 1 B. & Ad. Thomas v. Wright, 9 S. & R. (Penn.) 365; *Doe d. Miller v. Noden*, 2 Esp. 87; *Stedman v. McIntosh*, 4 Ired. (N. 530; but see *Williams v. Deriar*, 31 C.) L. 291; *Den v. Snowhill*, 3 Zab. Mo. 13. (N. J.) 447; *Jackson v. Bryan*, 1

² *Warner v. Hale*, 65 Ill. 395; *De-* Johns. (N. Y.) 322; see *Hemphill v. troit Sav. Bk. v. Bellamy*, 49 Mich. Giles, 66 N. C. 512.

ment against him, has been superseded by the statute, which gives to the lessor, after thirty days' notice, a summary process, where the lessee holds over his term. *Larkin v. Avery*, 23 Conn. 304.

In Missouri, the possession by a party under a mere permission to occupy for an indefinite period, no rent being reserved, is not a tenancy from year to year; so that in such case three months' notice to quit is not necessary. *Williams v. Deriar*, 31 Mo. 13.

But if the tenant disclaims his tenancy, denies his landlord's title, or, which is the same thing, requires him to prove those points, it is held that he can not insist on the want of notice to quit, although it should appear in the course of the trial that he was a tenant from year to year. *Tuttle v. Reynolds*, 1 Vt. 80; *Catlin v. Washburne*, 3 Vt. 25.

§ 35. **Tenants in Common and Joint Tenants.**—In case two or more persons are interested in the premises as tenants in common, a notice to quit given by one, on behalf of himself and co-tenants, will be valid only as far as his own share is concerned, unless he was acting at the time under the authority of the other parties. But this rule does not apply to cases where the parties are interested as joint tenants; because of the rule of law that any act of one joint tenant which is for the benefit of his co-joint tenant shall bind him, and it must be predicated upon the principle that the determination of the tenancy by such notice is for the benefit of the estate. And where such tenants in common are interested, as many of them as give notices may recover their respective shares, although the others do not join, unless, indeed, by the conditions of the tenancy, it is rendered necessary for all the parties to concur in the notice, in which case a notice given by some of the parties, without the sanction or authority of their companions, will be altogether invalid.¹

§ 36. **Tenancies of Uncertain Terms.**—The rule which requires a demand for possession or notice to quit, applies to all general and undefined tenancies, whether they originate simply by permission of the owner, by an entry under a void lease, by an entry pending a treaty for a purchase, or wherever no express agreement has been made as to the terms of the occupancy, the entry being lawful, or with the privity and consent of the owner. All such uncertain tenancies, whether created by grant, or contract, or arising by implication, are, so

¹ *Tyler on Ejectment*, 227; *Doe v. 10 B. & C. 626*; *Doe v. Chaplin*, 3 Goldwin, 2 Q. B. 142; *Doe v. Robin-Taunt.* 120; *Doe v. Baker*, 8 Taunt. son, 3 Bing. N. C. 677; *Doe v. Walters*, 241; *Allford v. Vickery*, 1 C. & M. 280.

far as to entitle the tenant to notice, constructively tenancies from year to year.¹

§ 37. **Intruders and Trespassers.**—It is a well settled rule of law that a person who obtains possession of real estate by intrusion or trespass upon the same is not entitled to notice, because his holding is not only hostile to the real owner but is, in its inception, wrongful, and it would be absurd to require of the owner in such cases either a demand for the possession or a notice to quit. The rule proceeds upon the theory that there is an entire want of privity and absence of contract relationship, expressed or implied between the parties, and the reasons upon which the law requiring notice rests do not exist.²

§ 38. **Possession Under Void Leases.**—When a party is in possession under a void lease payment of rent will not render the lease valid, but it renders the holding a tenancy from year to year; and a parol demise, void by the statute of frauds, becomes a tenancy from year to year; but such leases, though void otherwise, will still regulate the terms of the tenancy in other respects, as for the payment of rent, and the time of the year when the tenant must surrender the possession.³ But while a tenancy from year to year is ordinarily implied in favor of the owner, against one who enters under a parol lease for a term of years, void by the statute of frauds, yet where the entry is under an agreement by the owner to execute a valid lease, and he afterward in bad faith refuses to execute it, repudiates the relation of landlord and tenant, and within the year resumes dominion over the property, he is barred by his election, and has no remedy on an implied agreement for intermediate use and occupation.⁴

A lease, void by the statute of frauds, as to its duration, will regulate the

¹ Den v. Drake, 2 Green (N. J.) L. Etcheson, 5 Cranch (C. C. U. S.) 302. 523; Ellis v. Paige, 2 Pick. (Mass.) 72, ³Schuyler v. Leggett, 2 Cow. (N. Y.) 660; Morehead v. Watkyns, 2 B. note, and cases cited.

² Knowles v. Hull, 99 Mass. 562; Mon. (Ky.) 228; Doe v. Bell, 5 T. R. Meeker v. Place, 7 Blackf. (Ind.) 169; 471; Clayton v. Blakey, 8 Ib. 3; Doe Godwin v. Stebbins, 2 Calif. 103; v. Terry, 4 Adolph. & E. 274; Doe v. Eaton v. George, 3 Jones (N. C.) L. Cockell, Ib. 478; Doe v. Arney, 12 Ib. 385; Murphy v. Williamson, 85 Ill. 476.

149; Chicago, etc., R. Co. v. Knox ⁴Groton v. Smith, 36 N. Y. 245; College, 34 Ill. 195; Wood v. Wood, Doe v. Stratton, 4 Bing. 446. 83 N. Y. 575; Worthington's Lessee v.

terms of the tenancy, in respect to the rent, and the time of the year when the tenant is to quit; and if the tenant holds over he holds upon the former terms, and the relation between the parties will be that of a tenancy from year to year, and each party must give the other reasonable notice of an intention to terminate the tenancy. *Mitchell v. Cummings*, 1 Coldw. (Tenn.) 354.

Where a lease is invalid by the statute of frauds, the lessee having taken possession is held to be a tenant at will; and if the agreement is to pay rent monthly, the lessee is entitled to a month's notice to surrender possession before proceedings can be taken to dispossess him. The month's notice must terminate with one of the regular monthly periods. *Huyser v. Chase*, 13 Mich. 98.

§ 39. Persons Holding Under Defaulting Tenants, Mortgagors, etc.—The under-lessees of the mortgagor, vendee, or tenant in default, are in no better position than the person under whom they hold, and may be ejected in like manner. It is immaterial whether they hold, as tenants from year to year, or otherwise. And in those States where a mortgagor is entitled to notice to quit before ejectment can be brought, a purchaser from him is not, because the relationship of landlord and tenant does not exist between him and the mortgagee.¹

In an action of ejectment brought by a mortgagee against a purchaser of the interest of the mortgagor, or against a third person, between whom and the mortgagor there is no privity of contract or estate, a previous notice to quit is not necessary. *Jackson v. Foster*, 4 Johns. (N. Y.) 215; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 123; *Thunder v. Belcher*, 3 East, 449.

A tenant who endeavors to deprive his landlord of possession, under a fraudulent pretense of giving it up, is still to be considered a tenant, and can not defend himself as a stranger, nor prevent, by any pretense, under such circumstances, his landlord from regaining possession. A person who comes into possession under a tenant is in no better condition than the tenant himself, and can not defend his possession against the landlord. *Graham v. Moore*, 4 Serg. & R. (Penn.) 467.

A notice given by the lessor to his immediate lessee, who has continued to pay him his annual rent, is sufficient, though another person is in possession. *Jackson v. Baker*, 10 Johns. (N. Y.) 270.

A conveyed a parcel of land to B, and took a mortgage on the land, to secure the purchase money. B then consented to sell the land to C, who took possession; afterward A and B agreed to cancel their respective deeds, and the deed for the land thus canceled was returned to A, and the mortgage thus canceled was returned to B. In ejectment brought by persons claiming under a conveyance from A, against C, it was held that the action could be maintained, and that C, not being a tenant or mortgagee, was not entitled to a previous notice to quit. *Jackson v. Chase*, 2 Johns. (N. Y.) 84.

¹*Jackson v. Chase*, 2 Johns. (N. Y.) 487; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122; *Thunder v. Belcher*, 3 East, 449.

§ 40. **Tenants Holding Over.**—Where a tenant holds over after the expiration of his term, the landlord, it seems, may treat him as a trespasser, and eject him without notice or he may treat him as a tenant for another year, upon the terms of the original lease; and the right of the landlord to continue the tenancy will not be affected by the fact that the tenant refused to renew the lease, and had notified him that he had hired other premises. It is not in the power of a tenant to throw off his character as such, or deny his tenancy; nor has he the right to convert himself into a wrongdoer, any more than he could deny the landlord's title, and to entitle a tenant who holds over to notice, the holding over must be continued for such length of time, and under such circumstances, as to authorize the implication of assent on the part of the landlord.¹

§ 41. **Necessity for Notice, When Dispensed With.**—The necessity for a demand for possession or a notice to quit may be dispensed with in cases where the person entitled to notice commits any act which in law amounts to a denial of his landlord's title. By such an act the occupant's possession becomes adverse. He waives his right to notice and an action for the recovery of the possession of the lands so held may be sustained the same as in cases where the original entry was wrongful.²

If the tenant set his landlord at defiance, or do any act disclaiming to hold of him as tenant, this dispenses with the necessity of a demand for possession, or notice to quit, and the landlord may treat him as a trespasser.³

For example, should the tenant from year to year claim the

¹ Conway v. Starkweather, 1 Den. v. Middleton, 11 Gratt. (Va.) 527; (N. Y.) 113; Schuyler v. Smith, 51 Grubb v. Grubb, 10 B. & C. 816; Doe N. Y. 309; Rowan v. Lytle, 11 Wend. v. Pasquali, Peake, 259; Van Winkle (N. Y.) 616; Allen v. Jaquish, 21 v. Hinckle, 21 Cal. 342; Doe v. Whit- Wend. (N. Y.) 628; Garner v. Hannah, tick, Gow, 195; Doe v. Clarke, Peake's 6 Duer (N. Y.), 262; Livingston v. Add. Cases, 239; Horsey v. Horsey, 4 Harr. (Del.) 517; Trustees v. Meetze, Tanner, 12 Barb. (N. Y.) 484. 4 Rich. (S. C.) L. 50.

² Vincent v. Corbin, 85 N. C. 108; Kunzie v. Wixom, 39 Mich. 384; Eb- ³ Jackson v. Wheeler, 6 Johns. (N. erwine v. Cook, 74 Ind. 377; Herrell Y.) 272; Bates v. Austin, 2 A. K. v. Sizeland, 81 Ill. 457; Murphy v. Marsh. (Ky.) 270; Ross v. Garrison, 1 Williamson, 85 Ill. 149; Willison v. Dana (Ky.), 35; Tuttle v. Reynolds, 1 Watkins, 3 Pet. (U. S.) 43; Harrison Vt. 80.

premises as his own, under a title adverse to that of his landlord, or attorn to some other person, the landlord may consider his tenant as a wrongdoer, and bring ejectment for the possession of the premises. The acts of the tenant in such case are conclusive upon him, and the relation of landlord and tenant is dissolved.¹

A landlord demanded of his tenant the payment of rent, and the tenant replied "you are not my landlord," and, on the landlord then demanding possession of the demised premises, he refused to give up possession. This was held to amount to a disclaimer, and entitled the landlord to his action of ejectment. *Doe v. Long*, 9 C. & P. 773.

When condemnation proceedings for a right of way by a railroad company are void for want of a proper notice, or other defect, the company has notice that the owner claims the lands and the grounds of his claim, and finally informs him that he will have to sue if he gets anything; this will obviate the necessity of any formal demand before bringing ejectment. *C. & A. R. R. Co. v. Smith*, 78 Ill. 96 (1875.)

§ 42. What Amounts to a Denial of the Tenancy, etc.—

A conveyance by the tenant purporting to convey the premises in fee simple;² attornment to another;³ disclaiming the tenancy by a refusal to pay rent;⁴ declaring that his connection as tenant with the plaintiffs had closed;⁵ an attempted conveyance of his estate;⁶ a purchase of the demised premises at a tax sale;⁷ an abandonment of the premises;⁸ an attempt to deliver possession to an adverse claimant;⁹ acts of waste as selling stock on the farm, contrary to the terms of the lease;¹⁰ and other

¹ *Wall's on v. Watkins*, 3 Pet. (U. S.) 43; *Currier v. Earl*, 1 Shepley (Me.) 216; *Greene v. Munson*, 9 Vt. 37; *North v. Barnum*, 10 Vt. 220; *Hall v. Dewey*, 10 Vt. 593; *Tillotson v. Doe*, 5 Ala. 407; *Farrow v. Edmondson*, 4 B. Mon. (Ky.) 605; *Wilson v. Smith*, 5 Yerg. (Tenn.) 379; *Montgomery v. Craig*, 3 Dana (Ky.), 101; *Hockenburgh v. Snyder*, 2 Watts & S. (Pa.) 240; *Jackson v. Whitbeck*, 3 Johns. (N. Y.) 422.

² *Trustees v. Mutze*, 4 Harr. (Del.) 517.

³ *Montgomery v. Craig*, 8 Dana, (Ky.) 102.

⁴ *Doe v. Pittman*, 2 N. & M. 673.

⁵ *Grub v. Grub*, 10 B. & C. 816.

⁶ *Rising v. Stanwood*, 17 Mass. 282; *Lawton v. Savage*, 136 Mass. 111;

Cook v. Cook, 28 Ala. 660; *Robinson v. Deering*, 56 Me. 357; *McCan v. Rathbone*, 8 R. I. 403; *Matthews v. Ward*, 10 G. & J. (Md.) 459; *Howell v. Howell*, 7 Ired. (N. C.) 496; *Briggs v. Oaks*, 26 Vt. 138.

⁷ *Ferguson v. Etter*, 21 Ark. 160.

⁸ *Forbes v. Smiley*, 56 Me. 174; *Crowley v. Mullins*, 48 Mo. 517.

⁹ *Steinhauser v. Kuhn*, 50 Mich. 367; *Wall v. Goodenough*, 16 Ill. 416; *Ballance v. Fortier*, 8 Ind. 291; *Jones v. Tatham*, 20 Pa. St. 398; *McCartney v. Auer*, 50 Mo. 395.

¹⁰ *Daniels v. Pond*, 21 Pick. (Mass.) 367; *Perry v. Carr*, 44 N. H. 118; *Philips v. Covert*, 7 Johns. (N. Y.) 1; *Lay v. Stoddard*, 27 Ohio St. 478; *Briggs v. Oaks*, 26 Vt. 138.

similar acts amounting to a disavowal or disclaimer of the landlord's title, have been held in the cases cited to be sufficient to dispense with the necessity of a demand for possession or notice to quit.¹

§ 43. **What Does Not Amount to a Denial of the Tenancy.**—Any act of the tenant which does not amount to a direct repudiation of the relation between him and his landlord is not sufficient to dispense with the necessity of a demand for possession or notice to quit.² The acts which go to make up the disclaimer or disavowal, vary with the circumstances of every case, and the question as to whether they constitute such a disclaimer or repudiation of the tenancy as will dispense with the necessity of a demand or notice is, as a general rule, a question for the determination of the jury.³

§ 44. **Waiver of Notice.**—Like all other rights of a similar character the right to be notified of the intention of the landlord to terminate the tenancy may be waived by the tenant. The waiver may be by express stipulation in the lease,⁴ or by operation of law, as in case of any acts of disloyalty on the part of the tenant amounting to a disavowal of the tenancy or disclaimer of the landlord's right. On the other hand the landlord may waive his right to determine the tenancy under a demand of possession or notice to quit by various acts, as the acceptance of subsequently accruing rents,⁵ or by any subsequent act acknowledging the party as his tenant.⁶

The acceptance of rent as rent, for a time subsequent to the expiration of the notice, is an admission of the continuance of the tenancy, and a waiver of the notice. *Collins v. Conty*, 6 Cush. (Mass.) 415.

The unqualified acceptance of rent after the expiration of the notice to quit, is a waiver of the notice; but where there are circumstances creating

¹ *Montgomery v. Craig*, 5 Dana; *McCanna v. Johnston*, 19 Pa. St. 434; (Ky.), 101; *Williams v. Watkins*, 5 Hosford v. Ballard, 39 N. Y. 147; *Pet. (U. S.)* 43. *Byrane v. Rogers*, 8 Minn. 281;

² *Bolton v. Landers*, 27 Cal. 104; *Eichart v. Bargas*, 12 B. Mon. (Ky.) 464.

Bates v. Austin, 2 A. K. Marsh (Ky.) 464. ³ *Goodright v. Cordwent*, 6 T. R. 270; *Tuttle v. Reynolds*, 1 Vt. 80; *Willison v. Watkins* 3 *Pet. (U. S.)* 43; *219; Prindle v. Anderson*, 19 Wend. *Tillotson v. Doe*, 5 Ala. 407; *Brown (N. Y.)* 391; 23 Wend. (N. Y.) 616; *v. Keller*, 32 Ill. 151. *Collins v. Hasbrock*, 56 N. Y. 157.

⁴ *Bennett v. Long*, 9 C. & P. 773.

⁵ *Doe v. Williams*, 7 C. & P. 322;

⁶ *Harris v. Masters*, 2 B. & C. 490; *Doe v. Palmer*, 16 East, 53.

a doubt as to the intention with which it is received, or as to the *bona fides* of the tenants, the question should be submitted to the jury. Though it is not the absolute duty of a judge to submit the question to a jury where there are no qualifying circumstances, yet it would not be amiss to do so. *Prindle v. Anderson*, 19 Wend. (N. Y.) 391.

But the mere reception of rent accrued before the time for the termination of the tenancy, is not a waiver of the notice, or a renewal of the lease; for the lessor has the right to that absolutely, whether the tenancy is terminated or not. *Coke Litt.* 211 b; *Jackson v. Sheldon*, 5 Cow. (N. Y.) 456; *Jackson v. Allen*, 2 Cow. (N. Y.) 230; *Hunter v. Osterhoudt*, 11 Barb. (N. Y.) 33.

§ 45. Requisites of the Demand for Possession or Notice to Quit.—Care should be taken that the words of the notice are clear and decisive, without ambiguity or giving an alternative to the occupant; for if the notice is ambiguous or optional it will be ineffectual so far as the action of ejectment is concerned.¹ The general rule is that if the notice is sufficiently intelligible and certain, so that the tenant can not reasonably misunderstand it, it will be sufficient.² The forms of these notices and demands are frequently prescribed by statutes, and when so done, it will be sufficient to follow them. As an illustration, we quote the statute of Illinois.

§ 9. When default is made in any of the terms of a lease, it shall not be necessary to give more than ten days' notice to quit, or of the termination of such tenancy, and the same may be terminated on giving such notice to quit at any time after such default in any of the terms of such lease, which notice may be substantially in the following form, viz.:

To A B: You are hereby notified that in consequence of your default in (here insert the character of the default) of the premises now occupied by you, being, etc. (here describe the premises), I have elected to determine your lease and you are hereby notified to quit and deliver up possession of the same to me within ten days of this date. (Dated, etc.)³

Under section 2 of the forcible entry and detainer act, which provides in what cases the action will lie after a demand in writing has been made by the person entitled to such possession, it is provided that the demand may be in the following form:

To _____

I hereby demand immediate possession of the following described premises (describing the same).⁴

A notice to quit and deliver up premises held under an oral lease, which does not state or describe the cause for which it is given, nor the time when

¹ *Roberts v. Haywood*, 3 C. & P. 157, 7 T. R. 63; *Doe v. Roe*, 4 Esp. 432; *Adams on Ejectment*, 164.

185; *Doe v. Wrightman*, *Ib.* 5.

² *Cook v. Creswell*, 44 Md. 581; *Doe* ³ R. S. III. 1889, 877, § 9.

v. Spiller, 6 Esp. 70; *Doe v. Kight-* ⁴ R. S. III. 1889, 733, §§ 2, 3.

the tenant is required to quit, is insufficient to determine the lease. *Currier v. Barker*, 2 Gray, 224; *Steward v. Harding*, 2 Gray (Mass.), 335.

In New York, the notice need not specify the time within which the premises must be surrendered. It is sufficient if the tenant has thirty days' notice in writing of the intention of the landlord to terminate the tenancy, before the action of ejectment is brought. *Barnes v. Bryant*, 31 N. Y. 453.

The notice served by the landlord upon a tenant at will, to terminate his tenancy, takes effect in thirty days after the service; and the specification therein of a day on which the time will expire, which will be less than thirty days from the time of service, will not vitiate the notice. *The People v. Schackno*, 48 Barb. (N. Y.) 551.

§ 46. Computation of Time.—The question of the time in which the demand or notice is to be served is one of frequent importance. It is a well settled rule of law that where the period allowed for doing an act is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time, and so be excluded from the computation.¹ The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as where an act is to be performed within a specified period from or after a day named, is to exclude the day thus designated, and to include the last day of the specified period.²

§ 47. Who is Authorized to Give the Notice and Who is Not.—A duly authorized agent of the landlord, or his attorneys, are of course authorized to give the notice. And so is a receiver in chancery with power to let;³ an agent or steward of a corporation, though without authority under seal from the corporation;⁴ an agent to receive rents.⁵ But a mere receiver of rents has no authority, as such, to determine a tenancy by notice.⁶ Neither has an agent of an agent without evidence of recognition by the landlord;⁷ and a vendee who has entered into a contract for the purchase of the premises but has not attained the legal title can not give a valid notice to quit.⁸

¹ *Cornell v. Moulton*, 3 Den. (N. Y.) 16; *Bigelow v. Wilson*, 1 Peck, 485.

⁵ *Doe v. Mizem*, 2 Moo. & R. 56.

⁶ *Doe v. Walters*, 10 B. & C. 633.

² *Sheets v. Seldon's Lessee*, 2 Wall. (U. S.) 177.

⁷ *Doe v. Robinson*, 3 Bing. N. C. 677.

³ *Doe v. Reed*, 14 East, 57.

⁸ *Reeder v. Sayer*, 70 N. Y. 180.

⁴ *Wolf v. Goddard*, 9 Watts (Pa.), 544; *Roe v. Pierce*, 2 Camp. 96.

§ 48. **Service of the Notice or Demand.**—As a general rule the manner of serving these demands and notices is one of statutory regulation; but in the absence of such regulations it is always prudent and a matter of precaution to prepare them in duplicate, and deliver one to the person entitled to receive it, keeping the other, with a memorandum indorsed thereon as to the time and manner of service; the duplicate is always competent evidence and its service may be proved by the person who served it. But in case of neglect to preserve a copy or certificate, the notice and its contents and service upon the occupant may be proved, without notice to produce the original.¹

The service of the notice to quit, unless so provided by the statute, can not be proved by the written return and affidavit of the person making the service. The proof in such a case must be subject to the common law rule relating to cross-examination. *Hollingsworth v. Snyder*, 2 Iowa, 435.

§ 49. **By Whom the Notice May be Given.**—The notice must be given or the demand made in all cases by the landlord, or by some legally authorized person acting in his stead and by his authority. The notice, if one which the plaintiff had no right to give, or if given by one without authority to act, will be ineffectual and the tenant will not be bound to regard it.² By the term landlord as used in this connection is meant the person entitled to the possession of the lands in question, and if it be doubtful as to whom the right of possession is in, all persons interested should join in the notice.³ The notice must be such that the occupant may safely act upon it at the time of its service, as the time of service is the essence of the notice, and if it is made by a person without authority the landlord can not render it effectual or valid by adoption after the proper time for giving notice has gone by.

The general rule stated by Story.

When an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but

¹ *Doe v. Durnford*, 2 M. & S. 62. Y. 180; *Doe v. Brown*, 8 East, 165. *Doe v. Turford*, 3 B. & Ad. 890; A notice to quit should be signed by *Falkner v. Beers*; 2 Doug. (Mich.) 117; the landlord or a properly authorized *Eisenhart v. Slaymaker*, 14 S. & R. agent, to be binding on the tenant. (Pa.) 153; 1 *Greenleaf's Ev.*, § 561; *Ball v. Peck*, 43 Ill. 482.

Jory v. Orchard, 2 B. & P. 39; *Doe v. Somerton*, 7 Ad. & El. N. S. 58. ³ *Reeder v. Sayre*, 70 N. Y. 180; *Doe v. Chaplin*, 3 Taunt. 120; *Doe v.*

² *King v. Dickerman*, 11 Gray Baker, 8 Taunt. 241. (Mass.), 480; *Reeder v. Sayer*, 70 N.

amounts simply to the assertion of a right on the part of the principal, then the general rule referring to the effect of ratification seems generally applicable. But if the act done by such third person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses, or would defeat a right or an estate already vested in the latter, then the subsequent ratification of the unauthorized act by the principal will not give validity to it, so as to bind such third person to the consequences. Story on Agency, §§ 245, 246.

It was held in Maine, that a subsequent ratification will not operate to prejudice intervening rights, or to prejudice a person who has been guided by the transaction as it actually occurred. *Fisk v. Holmes*, 41 Me. 441.

It has been held by the Supreme Court of New Hampshire, that a notice to quit by two of three joint lessors will not terminate the entire tenancy so as to enable all of the lessors to maintain summary proceedings under the landlord and tenant act to recover the possession, and when the party giving the notice assumed to act for all, but had, in fact, no authority from one of them, it was held that a subsequent ratification, made after the time when the notice to quit was to take effect, will not be equivalent to a prior authority. *Pickard v. Perley*, 45 N. H. 188; *Currier v. Perley*, 24 N. H. 227; *Adams on Ejectment*, 158.

§ 50. **What is a Sufficient Service.**—Personal service upon the occupant himself when this can be had, is of course sufficient in all cases; but where this can not be had, delivery of the notice to his wife or agent upon the premises has been held sufficient, and so is service upon a person occupying the premises jointly with or under him;¹ and where two persons occupy the premises in common as tenants, notice to one is sufficient.² And where tenants are absent, service on the tenant's partner at his place of business, was held sufficient.³ Where the occupant is a corporation, the notice must be served upon its proper officer.⁴

In many States the mode and the sufficiency of the service in such cases are matters regulated by statute. In Illinois the demand may be made or notice served by delivering a copy thereof to the tenant or by leaving the same with some person above the age of twelve years residing on, or in possession of, the premises; and in case no one is in actual possession, then by posting the same on the premises.⁵

§ 51. **Forcible Entry and Detainer.**—The action of ejectment is now seldom resorted to by landlords to recover pos-

¹ *Walker v. Sharpe*, 103 Mass. 154.

⁴ *Doe v. Woodman*, 8 East, 228.

² *Doe v. Crick*, 5 Esp. 196.

⁵ R. S. Ill. 1889, 877, § 10; *Laws*

³ *Walker v. Sharpe*, 103 Mass. 154, Ill. 1865, 108.

and cases cited.

session of lands occupied by tenants. Other and more adequate remedies have been provided under statutes entitled forcible entry and detainer, and the jurisdiction has been vested in courts of inferior jurisdiction. As an illustration we quote the statutes of Illinois upon this subject:

§ 2. When a forcible entry is made, or when a peaceable entry is made and possession unlawfully withheld by force; or when entry is made into vacant and unoccupied lands or tenements without color of right or title; or when the lessee of lands or tenements, or a person holding under such lessee, holds possession without right after the determination of the lease by its own limitation or terms, or by notice to quit, or otherwise; or a vendee having obtained possession of lands or tenements under a written or verbal agreement to purchase, and having failed to comply with his agreement of purchase withholds possession thereof, after demand made in writing by the person entitled thereto; or when land has been sold under a judgment or decree of court in this State, and the party to such judgment or decree, after the expiration of the time of redemption, refuses or neglects to surrender possession thereof, after demand made therefor by the person entitled to the possession; in either case the person entitled to the premises may be restored to the possession, in the manner hereinafter provided. [By action of forcible entry or detainer.]

But under these statutes the rules of law relating to demand and notice remain unchanged.¹

§ 52. **The Ouster or Disseizin.**—The action of ejectment being the legal remedy for the recovery of the possession of land wrongfully withheld, an ouster or disseizin either actual or constructive, is an essential element of the plaintiff's case. As possession follows the legal title, it is sufficient for the plaintiff to show the legal title in himself and the possession of the premises in the defendant.² Ejectment is a possessory action. It is designed to redress no other wrong than that of holding the true owner out of possession, and it can not be maintained for land of which the plaintiff is himself in possession.³ The necessity, therefore, for a somewhat extended discussion of the subject is apparent.

¹ R. S. Ill. 1889, 732, §§ 1 and 2; 109; *Finnegan v. Carraher*, 47 N. Y. Laws 1871-2, 453. 493; *People v. Ambrecht*, 11 Abb. Pr.

² *Thompson v. Schuyler*, 2 Gil. (Ill.) (N. Y.) 97; *Goodright v. Rich*, 7 T. R. 271; *Bonner v. Greenlee's Heirs*, 6 Ala. 327; *Rodgers v. Bell*, 53 Ga. 94; *Hawkins v. Reichert*, 28 Cal. 534; *Simms v. Richardson*, 32 Ark. 304. *Betz v. (N. C.)* 283, *Allen v. Dunlap*, 42 Mullin, 62 Ala. 365; *Lyle v. Rollins*, Barb. (N. Y.) 585; *Banyer v. Empie*, 25 Cal. 440.

³ *Hill (N. Y.)* 48 *Lockwood v. Drake*, 53 Ill. 288; *Kribbs v. Downing*, 25 Pa. St. 399. 1 Mich. 14; *Kilgour v. Gockley*, 83 Ill.

§ 53. Defendant Must Be in Possession—Exception to the Rule.—For the recovery of the possession of vacant and unoccupied lands under the peculiar statutes of many States, an action of ejectment may be brought against a person not in possession but exercising acts of ownership over the same, or claiming title thereto, or some interest therein. We quote the statute of Illinois as an illustration.

If the premises are not occupied the action (ejectment) shall be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.¹

But under these statutes we do not understand that ordinarily a party in the actual occupation of land can maintain ejectment against one not in possession, who only claims title to the land. The specific relief of canceling a deed or removing clouds and settling titles could not be had in courts of law. Although contradictory decisions are to be found on the point of jurisdiction, it appears to be now fully established that where the claim of an adverse party to land is valid on the face of the instrument or the proceedings sought to be set aside, and it requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a court of equity may interfere to set it aside as a cloud upon the real title to the land, and order the same to be delivered up and canceled.²

§ 54. Seizin—The Term Defined.—The term *seizin* denotes the possession of a freehold estate. Originally the term was used in contradiction to that precarious kind of possession by which tenants in villenage held their lands, which was considered to be the possession of their lords, in whom the freehold continued.

Seizin is either (1) *seizin in fact*, as, where a freehold estate is conveyed to a person by feoffment with livery of seizin, which derive their effect from the statute of uses, he acquires a *seizin in deed* or *in fact*, and a freehold in deed; or (2) *seizin in law*, as, by descent, he only acquires a *seizin in law*, that

¹ *Starr & Curtis' R. S. Ill.*, 982; § 7 1 *Johns. Ch. (N. Y.)* 517; *Pettit v.* of the chapter on Ejectment. *Shepherd*, 5 *Paige (N. Y.)*, 493; *Pier-*

² *Sheldon, J., Reed v. Tyler*, 56 *Ill. Ill. Ill.* *Elliot*, 6 *Pet. (U. S.)* 95; *Ward* 288 (1870); *Hamilton v. Cummings*, *v. Dewey*, 16 *N. Y.* 519.

is, a right of possession, and his estate is called a freehold in law.¹

According to Lord Mansfield the various alterations which have been made in the law for the last three centuries have left us but the name of seizin, feoffment and freehold, without any precise knowledge of the thing originally signified by these sounds.

Mr. Justice Swayne said, "Seizin was originally the completion of the feudal investiture. In American jurisprudence, it means, generally, ownership. The covenant of seizin and the covenant of right to convey are synonymous."²

§ 55. **Disseizin—The Term Defined.**—The term disseizin denotes the privation of seizin. It takes the seizin or estate from one man and places it in another. It is an ouster of the rightful owner from the seizin or estate in the land, and the commencement of a new estate in the wrongdoer. It may be by abatement, intrusion, discontinuance or deforcement, as well as by disseizin, properly so called. Every dispossession is not a disseizin. A disseizin, properly so called, requires an ouster of the freehold. A disseizin at election is not a disseizin in fact, but by admission only of the injured party, for the purpose of trying his right in a real action.³ The term disseizin, its accurate definition and description, has been the subject of much discussion. The term is somewhat equivocal; the same facts may prove a disseizin for some purposes and in some respects and not in others.⁴

§ 56. **Disseizin—How Effected.**—Disseizin may be effected in corporeal inheritances or incorporeal.

(1.) Disseizin of things corporeal, as of houses and lands, must be by entry and actual dispossession of the freehold; as if a man enters by force or fraud into a house of another and turns, or at least keeps him or his servants out of possession.

(2.) Disseizin of things incorporeal, as of incorporeal hereditaments, can not be an actual dispossession, for the subject

¹ 2 Bouvier's Law Dictionary, 509. Woodward, 6 Johns. (N. Y.) 197

² McNitt v. Turner, 83 U. S. (16 (1810); Jackson v. Huntington, 5 Pet. Wall.) 352 (1872); Raw. Cov., 34; (U. S.) 402 (1831); Poignard v. Smith, Browning v. Wright, 2 Bos. & Pul. 14; 6 Pick. (Mass.) 172 (1828).

1 Washburn Real. Prop., 35.

⁴ Sumner v. Stevens, 47 Mass. 399

³ 1 Bouvier's Law Dictionary, 431; (1843).

Coke on Littleton, 277; Smith v.

itself is neither capable of actual bodily possession or disposssession.¹

Disseizin is an estate gained by wrong and injury; and therein it differs from dispossession, which may be by right or wrong. This is the uniform language of the best authorities from the time of Littleton: Litt. s. 279; Co. Litt. 3 b, 18 b, 153 b, 181 a; Cro. Jac. 685; 1 Salk. 246, n. 2; 1 Burr. 109; Smith v. Burtis, 6 Johns. (N. Y.) 217; Doe v. Thompson, 5 Cow. (N. Y.) 374.

It has been argued at the bar, that a person who commits a disseizin can not qualify his own wrong, but must be considered as a disseizor in fee. This is generally true, but it is a rule introduced for the benefit of the disseizee, for the sake of electing his remedy. For if a man enter into possession under a supposition of a lawful, limited right, as under a lease, which turns out to be void, or a special occupant, where he is not entitled so to claim, if he be a disseizor at all it is only at the election of the disseizee. Com. Dig., Seizin, F. 2 and F. 3; 1 Roll. Abrid. 662, l. 45; Id. 661 l. 45.

Disseizin does not necessarily imply a forcible entry or actual ouster by violence or fraud; for in cases of vacant possessions a simple tortious entry and open exclusive possession under claim of adverse title are equivalent to such entry and ouster. Hall v. Powel, 4 Serg. & R. (Penn.) 465.

"A mere entry upon another is no disseizin, unless it be accompanied with expulsion or ouster from the freehold." Smith v. Burtis, 6 Johns. (N. Y.) 217; Doe ex dem. Arden et al. v. Thompson, 5 Cow. (N. Y.) 374; Dow v. Plummer, 5 Shepl. (Me.) 14; Towle v. Ayer, 8 N. H. 57; Tilton v. Hunter, 11 Shepl. (Me.) 29; Thayer v. McLellan, 10 Shepl. (Me.) 417; Bailey v. Carleton, 12 N. H. 9; Melvin v. Proprietors of Locks, etc., 5 Met. (Mass.) 15; Brown v. King, 5 Metc. (Mass.) 173; Hall v. Mathias, 4 Watts & S. (Penn.) 331.

A peaceable entry on land, apparently vacant, furnishes *per se* no presumption of wrong. Smith v. Burtis, 6 Johns. (N. Y.) 218; 5 Cow. (N. Y.) 374.

The disseizor is "bound to show his tortious seizin affirmatively." Doe v. Thompson, 5 Cow. (N. Y.) 374; Smith v. Burtis, 6 Johns. (N. Y.) 118.

Where the entry is congeable, it can not work a disseizin. Richard v. Williams, 7 Wheat. (U. S.) 107; 6 Johns. (N. Y.) 218; Higginbotham et al. v. Fishback, 1 Marsh. Rep. (Ky.) 506; 6 Johns. (N. Y.) 218; 5 Cow. (N. Y.) 374; Jackson v. Rogers, 1 Johns. Cas. (N. Y.) 37, 47; Jackson v. Raymond, Ibid. 86, note; Brown v. Porter, 10 Mass. 100.

§ 57. **Disseizor Defined.**—A disseizor is one who puts another out of his lands wrongfully.²

§ 58. **Disseizee Defined.**—A disseizee is one who is wrongfully put out of possession of his lands.³

§ 59. **Disseizin and Ouster Synonymous Terms.**—The term ouster signifies the act of putting the legal owner of lands, tenements or corporeal hereditaments, out of his possession.

It may be accomplished by abatement, intrusion, disseizin,

¹ 1 Bouvier's Law Dictionary, 431; ² Bouvier's Law Dic. 431.

³ Black. Com. 169; 1 Chitty's Prac- ⁴ Bouvier's Law Dic. 431.
tice, 374 n.

discontinuance or forfeiture.¹ The terms ouster and disseizin as used in this work are synonymous terms.

§ 60. **Discussion of the Subject.**—A person is not necessarily disseized because another is in possession of his property. If a tenant for a term of years holds over, and the landlord is driven to an action of ejectment to recover his possession, the landlord by such holding over is not disseized; it is only by acts of a peculiar character that the relation of disseizor and disseizee is created. Of actual disseizin, that is, disseizin against the will of the owner, there are four kinds; three of those are accomplished by strangers, and one by tenants. (1) Where a man enters upon the immediate freehold and turns the owner out by force the act is generally and emphatically called a disseizin. (2) Where a stranger enters upon the seizin in law, which the heir takes on the death of his ancestor, it is then called an abatement. (3) Where a similar entry is made upon the estate of the reversioner or remainder-man, it is called an intrusion. (4) Where a discontinuance or directing of the estate in reversion or remainder is effected by the acts of the particular tenant or tenant of the freehold, whether he be tenant in tail by the courtesy or for life. A disseizin in fact is a tortious expulsion of the true owner; it is an estate gained by wrong and injury and therein it differs from dispossession, which may be by right or wrong. A bare entry on another, without an expulsion, makes such a seizin, only that the law will adjudge him in possession who has the right.² A disseizin by the act of a tenant in possession may take place by the destruction or determination, by alienation, surrender or otherwise of the particular estate upon which a remainder depends before the contingency happens upon which the estate is to rest.³

§ 61. **The Law Stated by Parsons, C. J.**—When a man not claiming any right or title to the land enters on it, he acquires no seizin but by the ouster of him who was seized, and he is himself a disseizor.⁴ To constitute an ouster of him who was seized, the disseizor must have the exclusive occupation of the land, claiming to hold it against him who was seized, or he

¹ Black. Comm. 167.

² 2 Black. Comm. 171; Varrick v.

³ Jackson v. Clark, 6 Johns. (N. Y.) Jackson, 2 Wend. (N. Y.) 166. 217; Varick v. Jackson, 2 Wend. (N. Y.) 166 (1828); Coke on Littleton, Sec. 279.

must actually turn him out of possession. When a disscizor claims to be seized by his entry and occupation, his seizin can not extend further than his actual exclusive occupation; for no farther can the party seized be considered as ousted; for the acts of a wrongdoer must be construed strictly, when he claims a benefit from his own wrong.

The running around of the land by a surveyor, and making lines, by the direction of one who claims no title to the land, is not such an exclusive occupation of the land as can amount to an ouster or disseizin of the demandants. Neither can the occasional cutting of the grass on the meadow by one who does not appear to have claimed the land, amount to disseizin.

To constitute a disseizin of the owner of uncultivated lands, by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of the land adverse to his title; otherwise a man may be disseized without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seizin has been interrupted.”¹

A disseizin may be effected without the actual knowledge of the owner of the land; acts of notoriety, such as putting a fence around the land or erecting buildings upon it, being constructive notice to all the world. *Poignard v. Smith*, 5 Pick. (Mass.) 172.

Illustrations.

What is not a sufficient ouster, etc.—Examples.

On a writ of entry, brought in 1877, there was evidence that in 1850, an academy building, which stood on the demanded premises, was repaired by a person who took charge of the academy as a teacher; that in the following year, the amount expended by him was raised by a subscription divided into shares of a certain amount each, and the amount paid to him; that the shareholders then took possession of the building and maintained a school in it until 1857, the lot being used as a playground; that in 1859, the shareholders sold the building, to be removed from the premises, and divided the proceeds; that from that time until 1864 the lot remained vacant, unfenced and unused; that in 1864, with money raised by the contributions of neighbors and former pupils, for the purpose, as declared in the subscription paper, of preserving the place for the benefit of the town, the lot was fenced, and planted with trees; that after this until 1877, when the town erected a library building thereon, the lot was kept in repair by the demandant and others, some of whom were the shareholders above referred to; that in 1877, prior to the date of the writ, the demandant procured deeds from some of the shareholders, which deeds were delivered on the land; and that he so acquired a majority of the shares. *Held*, that there was

¹ The Proprietors of the Kennebec Purchase v. Stringer, 4 Mass. 418.

sufficient evidence to warrant a finding that the demandant had not acquired a title by disseizin; *held, also*, that the subscription paper of 1864, being signed by the demandant's grantors, among others, was admissible to show that they did not claim title to the land at that time; *held also*, that evidence that a person not a subscriber to the subscription paper asked the demandant's permission to make the contemplated improvements was inadmissible in favor of the demandant. *Snow v. Orleans*, 126 Mass. 453 (1879).

If, on a writ of entry, the tenant disclaims evidence that the demanded premises were sold and conveyed by a collector of taxes to the tenant for non-payment of taxes by the demandant, and the deed put on record; that no entry was ever made upon or possession taken of the premises by the collector, or by any one in behalf of the tenant, but that, after the sale, the premises continued to be occupied by persons holding of the demandant the same as before the sale, and that the tenant did not notify the demandant that he did not claim the premises until the disclaimer was filed, does not show such an interference with the demandant's possession of the premises as to amount to a disseizin. *Field v. Hanly*, 126 Mass. 327 (1879).

Ouster—What constitutes—As between tenants in common.

Where one of two tenants in common of land, obtains the actual, exclusive possession of the whole tract, claiming it as his own, and denying any right of his co-tenant in the premises, and upon ejection being brought against him by his co-tenant to recover his interest, the defendant, instead of entering a disclaimer as to the plaintiff's interest in the land, pleaded not guilty and set up the statute of limitations, it was held that these acts on the part of the defendant constituted an ouster, and relieved the plaintiff from the necessity of proving an ouster by any other evidence. *Noble v. McFarland*, 51 Ill. 226 (1869).

§ 62. Essentials of a Disseizin.—To constitute a disseizin there must be a *pedis possessio*, an actual occupancy or substantial inclosure. When, therefore, a disseizor claims to be seized by his entry and occupation merely, his seizin can not extend farther than his actual, exclusive occupation.¹

The possession of the occupant must be such as to designate its extent, so that the owner may have notice of what he has been disseized, otherwise his title may be barred by lapse of time before he has had notice of the extent of the disseizin. This is a very just and reasonable rule of law, and ought not to be infringed. But we think it would be too strict to require when a field is cleared and cultivated that every foot of the land should be actually cultivated. There may be a strip or patch of land in the field, here and there, which could not be cultivated to any advantage. There may be rocks in it,

¹ *Wilde, J.*, in *Allen v. Holton*, 37 Springer, 4 Mass. 418; *Bates v. Nor-Mass*. 465 (1838); *Proprietors, etc., v. cross*, 14 Pick. (Mass.) 228.

and in land newly cleared there may be stumps and other obstructions to cultivation, and yet if the occupant cultivates the land so far as circumstances may allow, he must certainly be considered as having the exclusive possession of the whole field. If, therefore, a lot is bounded on a river and the occupant cultivates it as near the margin of the river as he conveniently can, he must be deemed to be in possession down to the stream. A different rule would be of little benefit to the disseizee, and would be very vexatious to the occupant.¹

§ 63. **A Disseizin May Be Inferred from Circumstances.**—The fact that the defendant claimed to have a deed of the premises in controversy, or assumed to have them, and to collect and retain the rents to his own use, or other acts of similar character, which amount to a complete denial of the plaintiff's right in the property, are acts from which a jury might infer an intent on the part of the defendant to exclude the plaintiff from all enjoyment in the premises, or in other words, an ouster.²

After a sale of land by articles of agreement, and payment of the purchase money, the vendee died, and his wife and children left the land; the vendor placed a tenant on it, and the possession continued in him, and those claiming under him, twenty-one years; *held*, that it was erroneous to charge the jury that the putting on the tenant was not an ouster, unless they believe that the vendor intended to commit an ouster. *Pipher v. Lodge*, 16 Serg. & R. (Penn.) 214.

§ 64. **Constructive Disseizin—By Election.**—In a real action the demandant has the right to elect to consider himself disseized for the sake of his remedy, although no actual disseizin is proved. Almost every injury which can be done to real estate may entitle a party to a recovery in a writ of entry, if he will admit himself to be disseized.³ To a plea of disclaimer or non-tenure it is a sufficient reply, that the tenant was at the commencement of the action in the possession of the premises disclaimed. If the law were not so a party could not commence an action to recover his lands in the possession of another, without exposing himself to the liability to pay costs if the tenant should disclaim, unless there had been an actual disseizin.⁴ In some States the doctrine of disseizin by

¹ *Allen v. Holton*, 37 Mass. 466 (1838).

² *Varick v. Jackson*, 2 Wend. (N. Y.) 177 (1828); *Allen v. Holton*, 37

³ *Durkee v. Felton*, 54 Wis. 405; Mass. 466.
11 N. W. Rep. 588 (1882).

⁴ *Allen v. Holton*, 37 Mass. 466.

election has been applied to actions of ejectment, but its application is of doubtful propriety.

The distinction between a disseizin by election, as contradistinguished from a disseizin in fact, was taken for the benefit of the owner of the land, and to extend to him the easy and desirable remedy by assize, instead of the more tedious remedy by a writ of entry. Whenever an act is done which of itself works an actual disseizin, it is still taken to be an actual disseizin, as if a tenant for years or at will should enfeoff in fee. On the other hand, those acts which are susceptible of being made disseizins by election are no disseizins till the election of the party makes them so, as if a tenant at will, instead of making a feoffment in fee, should only make a lease for years. *Jackson v. Rogers*, 1 Johns. Cas. (N. Y.) 36.

Disseizin in fact and disseizin by election have been so frequently confounded, that in examining the *dicta* of judges it is sometimes difficult to understand to which species of disseizin they allude, without referring particularly to the facts of the case which they had under consideration at the time such *dicta* were delivered. But by a careful examination of the authorities, it will be found that there could be no disseizin in fact, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some other act which was tantamount; such as a common law conveyance, with livery of seizin, by a person actually seized of an estate of freehold in the premises; or some one lawfully in possession representing the freeholder (1 Instit. 330, C. note 1); or by a common recovery, in which there was a judgment for the freehold, and an actual delivery of seizin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record. 2 Blk. Com. 348; Co. Litt. 330, C. note 1; *Doe v. Thompson*, 5 Cow. (N. Y.) 371; *Smith v. Burtis*, 6 Johns. (N. Y.) 197.

Story, J., said: "There is a distinction between disseizins which are in spite of the owner, and disseizins at his election. But the distinction often turns upon other principles than those which have been stated. The owner can not elect to consider himself disseized, when the act is not of such a nature as in law affords a presumption of a disseizin. But where an act is done which is equivocal, and may be either a trespass or disseizin, according to the intent, there the law will not permit the wrongdoer to qualify his own wrong, and explain it to be a mere trespass, unless the owner elects so to consider it." *Prescott et al. v. Nevers et al.*, 4 Mason (U. S. C. C.), 326, 329.

Walworth, Chancellor, said: "Two kinds of disseizin are mentioned in the English law books. The one was a disseizin in fact, which actually changed and divested the seizin of the original owner of the freehold, and deprived him of all right in relation thereto, except the mere right of entry and of property; and which under certain circumstances, was still further reduced to a mere right of action, the right of entry being lost. *Varick v. Jackson*, 2 Wend. (N. Y.) 166.

By this species of disseizin the wrongdoer acquired a fee simple, and the actual seizin of the property, together with nearly all the rights of the real owner, and all estates depending on the original seizin, were divested or displaced. The other kind of disseizin was called disseizin by election, because the owner might elect to consider himself disseized, for the sake of

the remedy by action of *novel disseizin*; but if he did not elect to consider himself disseized, the freehold was not divested, but still continued in him. *Bledden v. Baugh*, Cro. Car. 302.

§ 65. **Disseizin of Uncultivated Lands.**—To constitute a disseizin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety that the owner may be presumed to know that there is a possession of the land adverse to his title; otherwise a man may be disseized without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seizin has been interrupted.¹

Whatever may have been the ancient doctrine of disseizin in relation to feudal tenures, it has ever been held in this country, that an entry on vacant or uncultivated land, by one claiming to hold it, having no right, and without permission of the owner, accompanied with occupation or open visible possession, is sufficient to constitute a disseizin. This principle has been too frequently recognized to be now controverted.² Disseizin does not necessarily imply a forcible entry, or an actual ouster by violence or fraud; for in cases of vacant possessions a simple tortious entry and open exclusive possession, under claim of adverse title, are equivalent to such entry and ouster. Kent, P. J., says, that it lies with the disseizor to show his entry not congeable.³

Doubtless this ought to be made to appear to the satisfaction of the jury; but being a negative proposition, it can not commonly be proved by positive testimony; it may, therefore, be inferred from circumstances.⁴

§ 66. **A Disseizor Can Not Qualify His Act.**—It is generally true that a person who commits a disseizin can not qualify his own wrong, but must be considered as a disseizor in fee. But it is a rule introduced for the benefit of the disseizee for the sake of electing his remedy. For if a man enter into possession under a supposition of a lawful limited right as under

¹ *Proprietors, etc., v. Springer*, 4 *Boston Mill Co. v. Bulfinch*, 6 *Mass. Mass.* 417 (1808); *Sparhawk v. Bullard*, 229; *Knox v. Kellock*, 14 *Mass.* 200; 1 *Met. (Mass.)* 95; *Barker v. Salmon*, 2 ² *Smith v. Burtis*, 6 *Johns. (N. Y.) Met. (Mass.)* 32; *Bates v. Norcross*, 14 197, 218.
Pick. (Mass.) 224. ⁴ *Small v. Proctor*, 15 *Mass.* 497

³ *Small v. Proctor*, 14 *Mass.* 497; *Pro-* (1819).
prietors etc., v. Springer, 4 *Mass.* 416;

a lease, which turns out to be void, or as a special occupant, where he is not entitled so to claim, if he be a disseizor at all, it is only at the election of the disseizee. There is nothing in the law which prevents the disseizee from considering such a person as a mere trespasser, at his election, or which makes such an entry under mistake, for a limited estate, a disseizin in fee absolutely, and, at all events, so that a descent cast would toll the entry of the disseizee.

But, were it otherwise, in order to apply the doctrine at all, it must appear that the party found in possession entered without right and was, in fact, a disseizor; for if his entry were congeable or his possession lawful, his entry and possession will be considered as limited by his right. For the law will never construe a possession tortious unless from necessity. On the other hand it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful. And this upon the plain principle that every man shall be presumed to act in obedience to his duty, until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence as to its origin, it will be deemed lawful and co-extensive with the right set up by the party. If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee. And it is only when the party is proved to be in by disseizin that the law will construe it a disseizin of the fee and abridge the party of his right to qualify his wrong.¹

§ 67. **Seizin Once Shown, Presumed to Continue.**—The law upon this subject seems to be very well settled. When a man is once seized of land, his seizin is presumed to continue, until a disseizin is proved. When a man enters on land, claiming a right or title to the same, and acquires a seizin by his entry, his seizin shall extend to the whole parcel to which he has a right; for, in this case, an entry on part is an entry on the whole. When a man, not claiming any right or title to the land, shall enter on it, he acquires no seizin but by the ouster of him who was seized, and he is himself a disseizor. To constitute an ouster of him who was seized, the disseizor must have the actual exclusive occupation of the land, claiming to hold it against him who was seized, or he must actually turn

¹ Story, J., in *Ricard v. Williams*, 7 Wheat. (U. S.) 108 (1822).

him out of possession.¹ When a disseizor claims to be seized by his entry and occupation, his seizin can not extend further than his actual exclusive occupation; for no further can the party seized be considered as ousted; for the acts of a wrongdoer must be construed strictly when he claims a benefit from his own wrong.²

§ 68. **Incidental Matters.**—In the trial of an action at law it is impossible to foretell what points may be raised, or, in other words, what stumbling blocks ingenious counsel for the defense may be able to throw in the way of the plaintiff. In view of this fact some of the questions most likely to arise in the trial of an action of ejectment are presented.

§ 69. **Conveyance by the Plaintiff, Pending the Suit.**—The question is whether in an action of ejectment a conveyance to a third person, by the plaintiff, pending the suit, will defeat the action. There is little uniformity among the authorities upon this question. Some cases hold that the action is defeated by such a conveyance,³ while a contrary rule is laid down in others.⁴ But in many of the States this question is settled by statutory enactments. We quote the statute of Illinois as an illustration:

§ 23. It shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any of the profits of the premises demanded; but it shall be sufficient for him to show a right to the possession of such premises at the time of the commencement of the suit, as heir, devisee, purchaser or otherwise.⁵

In commenting upon and construing this law, Lawrence, J., of the Supreme Court of Illinois, said: "This is equivalent to saying that if the plaintiff had a title at the commencement of

¹ *Proprietors, etc., v. Springer*, 4 Marsh. (Ky.) 90; *Woods v. McGuin*, Mass. 417 (1808); *Boston Mill, etc., v.* 21 Ga. 582.
Bulfinch, 6 Mass. 224.

² *Proprietors, etc., v. Springer*, 4 Mass. 417 (1808); *Poignard v. Smith*, 8 Pick. (Mass.) 272; *Brimmer v. The Proprietors, etc.*, 5 Pick. (Mass.) 31; *Rust v. The Boston Mill Corporation*, 6 Pick. (Mass.) 158; *Pray v. Pierce*, 7 Mass. 381.

³ *Cresopis' Lessee v. Hutton*, 9 Gill 269; *Cheeney v. Cheeney*, 26 Vt. 606; *Alden v. Grove*, 18 Penn. 377.

⁴ *Jackson v. Leggett*, 7 Wend. (N. Y.) 377; *Jackson v. Jeffries*, 1 A. K. 372.

⁵ R. S. Ill. 1889, 600; Laws Ill. 1872,

the suit he shall recover, as the legislature had already provided in the third section,¹ that if he had none at the commencement he should not recover. The state of the title at the commencement of the suit is made the criterion for either success or defeat. For this there was good reason. It has been the constant policy of this State to promote the easy sale and conveyance of land. To this end it was enacted, at an early day, that land might be conveyed though adversely held. The action of ejectment is with us the only common law action for the determination of titles. Hence the statute gives each party a right to one new trial as a matter of right, and another in the discretion of the court.

It thus often happens that a case remains for years in the courts before reaching a final determination. It can not have been the intention of the legislature to prevent the conveyance of lands during the long period through which the plaintiff in ejectment may often be kept in courts, although the owner of a clear, paramount title. And this may be asserted with the more confidence in view of our short statutes of limitation under whose operation the grantee of a plaintiff in ejectment, or a purchaser under judgment and execution against the plaintiff, might be often barred from prosecuting a new suit. Neither can we discover any practical objection to allowing a plaintiff in ejectment to recover, notwithstanding a conveyance pending the suit. The recovery would be under the title upon which the suit was brought, and would practically inure to the benefit of his grantee.²

§ 70. Termination of Plaintiff's Title Pending Suit—Statutory Provisions.—In many of the American States this matter of the alienation or determination of the plaintiff's title pending suit is a matter of statutory regulation.

(1) CALIFORNIA.

SECTION 740. *If plaintiff's title terminates pending suit what he may recover.* In an action for the recovery of

¹This section is as follows: No person shall recover in ejectment, of some share, interest or portion thereof, to be proved and established at the trial.

²Lawrence, J., in *Mills v. Graves*, 44 Ill. 50 (1867).

real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be in accordance with the fact, and the plaintiff may recover damages for the withholding of the property.

2 Hittell's Code Calif., title Ejectment.

(2) COLORADO.

SECTION 264. *Alienation before and after suit not prejudicial action.* An action for the recovery of real property against a person in possession can not be prejudiced by any alienation made by such person, either before or after the commencement of the action.

Civ. Code Colo., Session Laws 1887, 173.

(3) DAKOTA.

SECTION 5462. *Alienation of property does not affect right of action.* An action for the recovery of real property against a person in possession can not be prejudiced by any alienation made by such person, either before or after the commencement of the action.

Compiled Laws Dak. 1887, Ch. 29.

(4) GEORGIA.

SECTION 3361. *Defendant may disclaim.* A defendant in ejectment may at the first term come in and disclaim any claim of title, or right of possession; and after such disclaimer is filed, such defendant shall not be liable for any future cost.

Lester, Rowell & Hill's Statutes 1882, 847.

(5) IOWA.

SECTION 3260. *Judgment for damages only.* If the interest of the plaintiff expire before the time in which he could be put in possession, he can obtain a judgment for damages only.

2 McClain's Statutes, 857.

This section applies to cases where the plaintiff holds a limited or determinable interest which expires, and not to cases where he holds an absolute estate, and pending the suit, conveys to a third person. In the latter case the suit may be prosecuted to judgment in the name of the original plaintiff under the following section. *Jordan v. Ping*, 32 Iowa, 64 (1871).

(6) KANSAS.

SECTION 598. *Recovery.* In an action for the recovery of real property, where the plaintiff shows a right to recover at

the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property.

Gen. Statutes Kan. 1889, 15.

(7) MICHIGAN.

SECTION 30. *Expiration of plaintiff's title before trial.* If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be rendered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed, and that as to the premises claimed, the defendant go thereof without day.

R. S. Mich. 1882, Ch. 269.

(8) MINNESOTA.

SECTION 10. *Termination of plaintiff's estate pending suit.* In an action for the recovery of real property, when the plaintiff shows a right to recover at the time the action was commenced, but it appears that such right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property.

R. S. Minn. 1878, 813.

(9) MISSISSIPPI.

SECTION 2504. *When title of plaintiff has expired.* If it shall appear at the trial, that the title of the plaintiff existed, as alleged in the declaration, in such manner that the plaintiff or plaintiffs, or one of them, was at the commencement of the action entitled to recover possession of the premises in question, or of some part thereof, but that such title has expired at the time of trial, the plaintiff or plaintiffs so entitled shall, notwithstanding such expiration, have a verdict according to the fact, that he had such right of recovery at the commencement of the action, and shall recover his costs of suit, but as to the premises claimed, the judgment shall be that the defendant go thereof without day.

Rev. Code Miss. 1880, 671.

(10) MISSOURI.

SECTION 4639. *Judgment where plaintiff's right expires after suit.* If the right of the plaintiff to the possession of the

premises expire after the commencement of the suit, and before the trial, the verdict shall be returned according to the fact, and judgment shall be entered only for the damages and costs.

R. S. Mo. 1889, Ch. 59:

(11) NEBRASKA.

SECTION 629. *Plaintiff's right terminating during pendency of action.* In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff shall recover for withholding the property.

Compiled Statutes Neb., 822.

(12) OHIO.

SECTION 5784. *The recovery when right terminates during the action.* In an action for the recovery of real property, when the plaintiff shows a right to recover at the time the action was commenced, but his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property.

R. S. Ohio 1880, 1396.

(13) OREGON.

SECTION 322. *Verdict when right of possession expires, etc.* If the right of the plaintiff to the possession of the property expire after the commencement of the action, and before the trial, the verdict shall be given according to the fact, and judgment shall be given only for the damages.

R. S. Oreg., Ch. 4, Title 1.

(14) PENNSYLVANIA.

SECTION 13. *By assignment of plaintiff's title.* When the title of a plaintiff in ejectment to lands may have been changed by sale or assignment, after action brought, the suit shall not be affected thereby, but the purchaser or assignee may prosecute said action; and the verdict and judgment in said action shall inure to him in the same manner as they would have inured to the said plaintiff if no sale or assignment had taken

place; and the purchaser of the real estate in controversy may be substituted on record by a motion in open court.

1 Brightly's Purdon's Digest, 531.

(15) WISCONSIN.

SECTION 3085. *Verdict when plaintiff's right has ceased.* If the right or title of a plaintiff in such action expire after the commencement of the action, the verdict shall be according to the fact; and the damages for rents and profits shall be assessed up to the time that such right or title expired, and judgment therefor only shall be rendered in favor of such plaintiff.

R. S. Wis. 1878, Ch. 183.

§ 71. **Conveyance after Suit to Correct Mistake in a Former Conveyance.**—It is an inflexible rule in ejectment that the plaintiff must recover, if at all, upon his legal title as it stood at the commencement of the suit, or at least at the date of the demise laid in his declaration. A deed made after the commencement of the suit conveying the lands in dispute to the plaintiff can not help him even though it recite that the grantor intended by a former deed to convey the lands in dispute to the plaintiff in the suit.¹

§ 72. **Title Acquired after Suit Brought.**—If after the commencement of the action the plaintiff has acquired a title to the land, he can assert such title only in a new suit. He can not recover upon a title acquired since the commencement of his suit.²

R. S. Wis. 1878, Ch. 183.

¹ Johnston v. Jones, 66 U. S. (1 Black) 459 (1861); Lithfield v. Dub. Black) 209 (1861). & P. R. R. Co., 74 U. S. (7 Wall.) 270

² McCool v. Smith, 66 U. S. (1 (1868).

CHAPTER XIII.

POSSESSION AS APPLIED TO ACTIONS OF EJECTMENT.

- § 1. The Term Defined.
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- 3. Actual and Constructive Possession Continued.
- 4. Actual Possession of Land.
- 5. What Constitutes Possession of Land.
- 6. Possession, How Held.
- 7. Where the Possession Is Mixed, etc.
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- 11. Possession Not Under Paper Title—Uninclosed Lands.
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- 13. Possession, *Prima Facie* Evidence of Title.
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- 23. Possession Admitted, When.
- 24. Possession Delivered to Plaintiff, When.

§ 1. **The Term Defined.**—Possession signifies the detension or enjoyment of a property, which a person holds or exercises by himself or by another. By the possession of a thing, we always conceive the condition in which not only one's own dealing with the property in question is physically possible, but every other person's dealing with it is capable of being excluded. In order to complete a possession two things are required.¹

(1.) An occupancy.

(2.) An intention to possess.

¹ 2 Bouvier's Law Dictionary, 351.

§ 2. **Actual and Constructive Possession.**—Possession is under the common law divided into two kinds:

(1.) *Actual*, as when the property in question is in the immediate occupancy of a person.

(2.) *Constructive*, as when the property in question is not in the immediate occupancy of the person, but which he claims to hold by virtue of same title without having the actual occupancy.¹

§ 3. **Actual and Constructive Possession Continued.**—All of the authorities make a distinction between the possession of lands by a mere usurper and possession under color of title. In the one case, the person is deemed to be in possession of nothing of which he is not in the actual tangible occupation, while, in the other case, his possession is not limited by his actual occupancy, but it will be construed to embrace all the land covered by his title. Where a person enters into land under a claim of title thereto by a recorded deed or other instrument in writing sufficient to constitute color of title, his entry and possession are referred to such title or color of title, and his possession is by construction deemed to be of the land co-extensive with the boundaries stated in his deed or other instrument in writing, where there is no open adverse possession of any part of the land so described in any other person.²

And it is not essential that the instrument under which the land is claimed be recorded, provided the same is good in point of form, purports to convey the legal title, and is sufficiently executed.³

§ 4. **Actual Possession of Land.**—Actual possession of land may arise in different ways, as by entering upon and improving the same with the intention of appropriating it to an ordinary and useful purpose, agriculture or otherwise, which

¹ 2 Bouvier's Law Dictionary, 351. 475; Buynum v. Thompson, 3 Ired. Under the civil law possession is divided into two kinds: (1) natural, (N. C.) 578; Fitzrandolph v. Norman, 2 Taylor (N. C.), 131; Johnson v. McMillan, 1 Strob. (S. C.) 143; Webb v. Sturtevant, 1 Scam. (Ill.) 181; Kyle v. Tubbs, 23 Cal. 431; Wilbour v. Anderson, 37 Miss. 155.

² Story, J., in Prescott v. Nivers, 4 Mason (U. S.) 330; Jackson v. Porter, Paine's C. C. R. (U. S.) 457; Potts v. Gilbert, 3 Wash. C. C. R. (U. S.) 125; Minot v. Brooks, 16 N. H. 374.

³ Lea v. Polk, etc., Co., 21 How. (U. S.) 493; Dickinson v. Burden, 30 Ill. 239; Hanna v. Renfro, 32 Miss. 125; Minot v. Brooks, 16 N. H. 374.

in their nature in connection with the claim of right, indicate an exclusive use and control of the property; for example, by breaking prairie for cultivation, by erecting buildings, by inclosures, by sinking shafts for mining coal or ore, by opening quarries for obtaining rock, and by a user thereof to the exclusion of others, or by the use and control of timber land belonging to a farm, although disconnected therewith, for ordinary supply of wood or timber. The visible and exclusive appropriation and use of a tract of land, claiming the whole under color of title, or a deed purporting to convey the whole, is, in contemplation of law, an actual possession of the entire tract.¹

Houses built for tenants, which at times were unoccupied, the land being at such times untitled, if kept under the control of their owners, are notice of adverse possession, which, together with the color of title derived from a duly registered deed, would constitute a good defense to ejectment. *Hill v. Weir*, 33 Fed. Rep. 100.

§ 5. **What Constitutes Possession of Land.**—To constitute a possession of land there must be some unequivocal act of ownership on the land itself, but it is by no means necessary that the land should be inclosed by a fence. This idea has long since been exploded. It is not necessary even to defeat an adverse title. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property; but there are many other acts which are equally evincive of such an intention, such as entering upon the land and making improvements and raising a crop thereon, cutting down and taking away timber, all of which may be done without a fence. Any act done evincing to the neighborhood in which it is situated that the land is appropriated to individual use is sufficient; the possession will then be deemed co-extensive with the title under which the party doing the act, claims.²

In an action of ejectment, when the evidence shows that the possession of plaintiffs and their grantors was open, notorious and adverse, and continued

¹ *Brooks v. Bruyn*, 18 Ill. 539; 24 *Meredith v. Pearl*, 10 Pet. (U. S.) 413; Ill. 372; *Keith v. Keith*, 104 Ill. 402 *Davis v. Easley*, 13 Ill. 198; *Dills v.* (1882); *Penn v. Preston*, 2 Rawle Hubbard, 21 Ill. 328; *Jackson v. Oltz*, (Penn.), 14; *Machin v. Geortner*, 14 8 Wend. (N. Y.) 440; *Sawyer v. New-* Wend. (N. Y.) 239; *Sawyer v. New-* land, 9 Vt. 383; *Meredith v. Pearl*, 10 14 Wend. (N. Y.) 239; *Penn v. Pres-* ton, 2 Rawle (Pa.), 14; *Keith v. Keith*, Pet. (U. S.) 413.

² *Brooks v. Bruyn*, 24 Ill. 372 (1860); 104 Ill. 402 (1882).

for more than seven successive years before the defendant purchased or entered into possession, this is sufficient to vest in plaintiffs the title to the land, and to enable them to maintain an action of ejectment for it; following *Logan v. Jelks*, 34 Ark. 547; *Crease v. Lawrence*, 48 Ark. 312; 3 S. W. Rep. 196 (1887).

§ 6. **Possession—How Held.**—Possession of land may be held in different modes. It may be held by inclosure, by cultivation, by the erection of buildings or other improvements, or in fact by any use that clearly indicates an appropriation, to the use of the person claiming to hold the property.¹

§ 7. **When the Possession Is Mixed, Legal Seizin Follows Legal Title.**—Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seizin of the whole, unless he is disseized by actual occupation and dispossession, and where the possession is mixed, the legal seizin is according to the legal title.

Title draws possession to the owner of the fee. It remains until he is dispossessed, and then no further than actual dispossession by a trespasser, who can not acquire a constructive possession, which always remains with the owner. This doctrine is founded in justice, favors right and resists wrong and oppression.²

Where two or more are holding land adversely, with a conflict of boundary, and claiming title by possession alone, the one first entering will be presumed to hold to the extent of his boundary, unless that occupancy has been abandoned; and the subsequent entry will not draw to it title while both in possession are claiming to the extent of their respective boundaries, unless there is an adverse possession acquired by occupancy and actual inclosure for fifteen years prior to the bringing of ejectment. *Green v. Wilson* (Ky.) 2 S. W. Rep. 564 (1887).

§ 8. **Acts Not Constituting Possession—Trespasses.**—Payment of taxes, surveying and assertion of right do not alone constitute possession. They merely show a claim of title. Such acts as going upon land from time to time, and cutting logs thereon, do not give possession. These acts are merely trespasses upon the land against the true owner, whoever he may be. They

¹ *Truesdale v. Ford*, 37 Ill. 210.

Ridgeley, 5 Harr. & J. (Md.) 245; *Hall*

² *Deputron v. Young*, 134 U. S. 241 v. *Powell*, 4 Serg. & R. (Penn.) 465; (1889); *Hunnicut v. Peyton*, 102 U. S. 333, 368; *Barr v. Gratz*, 17 U. S. 4; *Wheat*, (U. S.) 213, 223; *Codman v. Stephens*, 1 Dev. & B. (N. C.) 5; 4 Winslow, 10 Mass. 146 (1813); *Davidson's Lessee v. Beatty*, 2 Harr. Brimmer v. Proprietors, etc., 5 Pick. (Mass.) 131 (1827); *Hammond v.*

consist in taking value from the land and not in putting value upon it. Any other intruder may commit similar trespasses, without liability to any other trespasser. They do not constitute a disseizin of the true owner.¹

§ 9. **What Acts are Sufficient to Constitute a Possession of Public Lands.**—What acts are sufficient to constitute such a possession of public land as will maintain ejectment, has long been a vexed question in the courts, and the courts of some States have found it impossible to announce any general rules that would meet the varying circumstances of every case. It seems to be generally agreed, however, that these acts must in a great measure depend upon the character of the land, the locality, and the object for which it is taken. While arable or meadow land should be inclosed with a substantial fence, unimproved land, valuable only for the timber upon it, might be held by a much less substantial inclosure, and cultivation or improvement would not be necessary. There must be an actual *bona fide* occupation, a *possessio pedis*, a subjection to the will and control, as contradistinguished from the mere assertion of title, and the exercise of casual acts of ownership, such as recording deeds, paying taxes, etc. Staking off of land, without being followed up by occupation or other acts of ownership, does not constitute such a possession as will be sufficient to maintain the action of ejectment.²

§ 10. **Presumptions—Possession of Unoccupied Land, etc.**—Where land is unoccupied in fact, he who has the title is deemed in possession, for all purposes of protecting and defending his rights, and he who is in the actual possession of land claiming the fee, is presumed to have the fee until the contrary appears, and may maintain an action for an invasion of his possession against any one but him who, in fact, has the legal title or right of possession.³

§ 11. **Possession Not Under Paper Title—Uninclosed Lands.**—The possession of lands unaccompanied with paper title requisite to furnish the presumption of ownership sufficient

¹ Thompson v. Burhans, 79 N. Y. 93; iams, 7 Wheat. (U. S.) 59; Brooks v. 15 Hun (N. Y.), 580; but see Woods Bruyn, 18 Ill. 539; 24 Ill. 372; Van v. Banks, 14 N. H. 101. Brunt v. Schenck, 11 Johns. (N. Y.)

² Sankey v. Noyes, 1 Nev. 71.

³ Van Rensselaer v. Radcliff, 10 Davis v. Easley, 13 Ill. 192; 4 Kent Wend. (N. Y.) 639; Ricard v. Will- Com. 120.

to maintain this action, must be actual; nothing less will answer. When lands are unoccupied, unimproved and uninclosed, it is quite difficult to make out such possession. But it can sometimes be done by showing that it was kept as a wood lot of suitable size for an improved farm, and that the owner of the farm habitually, for some years, cut thereon his firewood, saw logs, fencing and building timber.¹ As every case depends upon its own peculiar circumstances, this example furnishes a sufficient illustration of the law.

§ 12. **Possession of Joint Tenants, etc.**—It is a maxim of the common law that the possession of one joint tenant, parcener, or tenant in common, is *prima facie* the possession of his companion also. And it therefore follows that the possession of one joint tenant can never be considered by the common law as adverse to the title of the other, unless it be attended by circumstances demonstrative of an adverse intent; or, in other words, whenever one joint tenant, parcener, or tenant in common is in possession, his fellow is, in contemplation of the common law, in possession also, and it is necessary in order to enable his companion to maintain ejectment, to rebut this presumption by proof of an actual ouster.²

§ 13. **Possession Prima Facie Evidence of Title.**—Possession of land is *prima facie* evidence of title, and is sufficient evidence of title as against all persons, but one who can show either a prior possession or a better title. It must be a possession *animo dominendi*. The benefit of such a possession is not lost if the possessor leaves the land temporarily vacant *animo revertendi*. As against a subsequent intruder without right, such prior possession is sufficient evidence of title. But one who has entered upon land without a title may abandon his possession, intending to surrender his dominion over the same, and then any other person may enter upon the vacant land and have the benefit which possession gives, even against such prior possessor. Such abandonment may be evidenced by any unequivocal act, or by long-continued absence from and inattention to the land, or it may be inferred from other circumstances.³

¹ Miller v. L. I. R. Co., 71 N. Y. Gary, Salk. 285; Smales v. Dale, Hob. 380; Machin v. Geortner, 14 Wend. 120; Barnet v. Keen, 7 T. R. 386. (N. Y.) 239.

³ Mayor, etc., v. Carlton, 22 Jones

² Adams on Ejectment, 136; Ford v. & S. 555; 113 N. Y. 284; 21 N. E. Rep.

§ 14. **Possession, When Sufficient to Authorize a Recovery.**—It is well settled, upon common law authority and by the decisions of American courts, that in an action of ejectment, proof of prior possession by the plaintiff, claiming to be the owner in fee, is *prima facie* evidence of ownership and seizin, and although the lowest kind of evidence it is sufficient to authorize a recovery, unless the defendant shows a better title.¹

§ 15. **Prior Possession as against Trespassers.**—A trespasser or mere intruder can not enter upon the possession of a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of real property. But if he had actual prior possession of the land, it is enough to enable him to recover it from a trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is still practiced, or by an ejectment, or he may maintain trespass.²

In ejectment, defendant claimed ownership under an oral contract with plaintiff's grantor to convey or devise to her and one P. the premises in question, in consideration of their moving thereon and taking care of her for the remainder of her life, and proved performance of the contract on their part, but a failure on the part of decedent, except the devise to P. of a life interest in the premises to which defendant subsequently succeeded: *Held*, that defendant's possession under the contract was a sufficient defense to the action. *Kenyon v. Youlan*, 53 Hun, 591; 6 N. Y. Sup. 784 (1889).

Where, in an action of ejectment in which neither party shows any paper

55 (1889); *Allen v. Rivington*, 2 Wms. Scam. (Ill.) 533; *Davis v. Easley*, 13 Saund. 111 a; *Doe v. Webber*, 1 Adol. Ill. 198; *Brooks v. Bruyn*, 18 Ill. 539; & E. 119; *Asher v. Whitlock*, L. R. Keith v. Keith, 102 Ill. 402 (1882); 1 Q. B. 1; *Smith v. Lorrillard*, 10 Hardisty v. Glenn, 32 Ill. 62; *Bowman Johns* (N. Y.) 337; *Novion v. Hallett*, 16 Johns. (N. Y.) 327; *Jackson v. v. Wettig*, 39 Ill. 417. Denn, 5 Cow. (N. Y.) 200; *Whitney* ² *Chisty v. Scott*, 14 How. (U. S.) 282; *Burt v. Panjand*, 99 U. S. (9 v. Wright, 15 Wend. (N. Y.) 171; Otto 180 (1878); *Allen v. Rivington*, 2 Carleton v. Darcey, 99 N. Y. 566. Saund. 111; *Doe v. Reade*, 8 East, 356; *Doe v. Dyeball*, Moo. & M. 346; ¹ *Anderson v. McCormick*, 129 Ill. 311 (1889); *Jackson v. Hazen*, 2 Johns. Jackson v. Hazen, 2 Johns. (N. Y.) 438; *Whitney v. Wright*, 15 Wend. (N. Y.) 171; *Catteris v. Cowper*, 4 86; *Day v. Alverson*, 9 Wend. (N. Y.) Taunt. 548; *Graham v. Peat*, 1 East, 223; *Hubert v. Hubert*, Breese, (Ill.) 246; *Jackson v. Po-ston & W. R. R.* (Beecher's Ed.) 357; *Mason v. Park*, 3 Co., 1 Cush. (Mass.) 575.

title, it is shown that plaintiff's decedent entered upon the land ten years previously, and fenced it on all sides except where it abutted on his own land, which possession was continued by his administrator till ousted by defendant, a state of facts is shown sufficient to warrant a judgment for plaintiff. *Foot v. Murphy*, 72 Cal. 104; 13 Pac. Rep. 163 (1887).

§ 16. **Presumptions of Possession Which Follow the Title, etc.**—It is also well settled that where there is evidence of a lawful title, accompanied with seizin and possession, it is presumed to continue in the lawful owner and his heirs and assigns, until an actual ouster and disseizin shall be proved. Thus the owner who is seized of upland bounded by the salt waters is supposed to have the seizin of the flats to the channel, not exceeding one hundred rods.¹ So the owner of the wharf, who is seized of the wharf, is supposed to have the seizin of the flats appurtenant to the wharf until severed by grant, disseizin, or in some other way, from the upland or wharf.²

§ 17. **The Fee Draws to it the Possession—Equitable Title Defined.**—The doctrine is uniformly recognized, and of general application, that the fee draws to it not only the right of, but the constructive possession. These rights at law accompany the fee, and must be recognized and enforced at law. A mere contract or covenant to convey at a future time, on the purchaser performing certain acts, does not create an equitable title. It is but an agreement that may ripen into an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title, and may compel a conveyance. When the purchaser is in a position to compel a conveyance by a bill in chancery, he then holds the equitable title. Before that time he has only a contract for a title when he performs his part of the agreement.³

§ 18. **The Purchaser Under a Contract Not Entitled to Possession Unless, etc.**—In the absence of an agreement to the contrary, the purchaser of real estate who does not receive a deed, but simply a contract for a conveyance at a future day,

¹This one hundred rod limit refers to an ancient colonial charter of Massachusetts; *Ingraham v. Wilkinson*, 4 Pick. (Mass.) 271.

²*Putnam, J., in Brimmer v. Proprietors, etc.*, 22 Mass. 131 (1827).

³*Walker, J., in Chappell v. McKnight*, 108 Ill. 575 (1884); *Bispham's Equity*, Sec. 365; *Suffern v. Townsend*, 9 Johns. (N. Y.) 35; *Cooper v. Starver*, 9 Johns. (N. Y.) 331; *Erwin v. Clinstead*, 7 Cow. (N. Y.) 229.

is not entitled to the possession of the land thus purchased. The principle is well recognized that the owner of the fee, as a general rule, is entitled to the possession of the land, as against all persons not in under some valid agreement from him. And not only so, but when vacant and unoccupied, the fee draws to it, in contemplation of law, the possession. The mere fact that a person enters into a contract for the purchase of land, does not entitle him to enter upon and hold it. It is true, the purchaser may acquire that right by the terms of the agreement or otherwise. But in the absence of some agreement to enter, his possession in such case would be unauthorized, and the vendor might recover possession.¹

§ 19. **Constructive Possession.**—Constructive possession is sometimes called possession in law without possession in fact. It exists where a party claims title by deed or under some instrument of writing sufficient to constitute color of title to the land therein described. When the party claims adversely under color of title the law makes his actual possession of a part constructive possession of all by extending it to the whole tract. But if he claim as real owner he is presumed in law to be in possession of the entire tract through his deed, without any physical occupation of it, or, in other words, his deed gives him constructive possession of all the land embraced in it. The party may hold the possession adversely to the real owner under color of title, or he may hold as the real owner. If he holds as the real owner, then it is not necessary that he should be in the actual or tangible possession of any part of the tract; his possession under his deed is possession of the whole tract; but if he is holding adversely under color of title, then there must be some actual, tangible occupation to a part of the land in question, which the law, by construction, will extend in the whole tract.²

The doctrine of constructive possession, which follows the

¹ Walker, J., in *Williams v. Forbes*, Billings, 89 Ill. 188; *Barger v. Hobbs*, 47 Ill. 148 (1868). 67 Ill. 592; *Stevens v. Brooks*, 24

² *Wilson v. Williams*, 52 Miss. 493; *Wis. 329*; *Hodges v. Eddy*, 38 Vt. Cunningham v. Frandtzen, 26 Tex. 344; *Buck v. Squiers*, 23 Vt. 504; *Chap-38*; *Pepper v. O'Dowd*, 39 Wis. 544; *man v. Templeton*, 53 Mo. 465; *Wash-Chandler v. Rushing*, 38 Tex. 596; *burn v. Cutter*, 17 Minn. 361; *Putnam Powell v. Davis*, 54 Mo. 318; *Wells v. Free School v. Fisher*, 34 Me. 177; *Iron Co.*, 48 N. H. 530; *Phillippi v. Bailey v. Carlton*, 12 N. H. 15; *Thompson*, 8 Or. 436; *Coleman v. Brackett v. Persons, etc.*, 53 Me. 228.

title, is applied to one who takes actual or corporeal adverse possession under color of title, and he is held to be possessed of the contiguous land covered by the instrument under which he enters, and which he claims by virtue of such instrument.¹

§ 20. Constructive Possession is Based upon Actual Possession.—There can be no constructive possession without a written instrument and a definite description of lands contained therein upon which to construct the possession,² and as a further essential to this kind of possession it is necessary that the party claiming it should have an actual occupancy of some part of the premises in question. There must be an actual entry and ouster of the real owner by the party claiming under the paper title. Constructive possession is based upon the actual possession and must stand or fall with it; here, if the occupant sells that part of the premises of which he has the actual possession he loses that part of which he had the constructive possession.³

Plaintiff claimed land under a parol purchase, supported by adverse possession during the statutory period by cultivating part of the land, the residue being uninclosed. The court charged that if plaintiff was in actual possession of the cultivated part of the land only, he could recover no more. The jury found for defendant: *Held*, that since plaintiff claimed constructive possession of the whole tract by actual possession of part, his failure to obtain a verdict for that part made the instruction as to the residue immaterial. *Hames v. Harris*, 50 Ark. 68; 6 S. W. Rep. 233 (1888).

§ 21. Effect of Possession Under a Deed Void for Want of a Proper Description of the Premises.—One in possession of lands claiming by metes and bounds under a paper title, and openly and notoriously exercising control and dominion over the land, is presumed to be doing so to the extent of his claim. But where his paper claim is void for want of any description of the land, or anything to define its extent, his acts and dominion can create no such presumption. The occupancy must

¹ *Fugate v. Pierce*, 49 Mo. 447.

Woodruff, 1 Cow. (N. Y.) 285; *Wash-*

² *Thompson v. Burcham*, 79 N. Y. 99; *Fugate v. Pierce*, 49 Mo. 441; *Crispen v. Hannavan*, 50 Mo. 544; *Moingona, etc., Co. v. Blair*, 51 Iowa Scales v. Cockrill, 3 Head (Tenn.), 448; *Baker v. Swan*, 32 Md. 355; 436; *Humbert v. Trinity Church*, 24 Clarke v. Courtney, 5 Pet. (U.S.) 353; *Wend*. (N. Y.) 604; *Wells v. Iron Thayer v. McLellan*, 23 Me. 419; *Company*, 48 N. H. 530; *Long v. Higginbotham*, 56 Mo. 251; *Jackson v.*

³ *Chandler v. Rushing*, 38 Tex. 597.

be such as to give notice to the real owner of the extent of the adverse claim. Occupancy, without a deed defining the land, is only notice to the boundaries actually inclosed or improved.¹

§ 22. **Constructive Possession Does Not Embrace Lands in the Adverse Possession of Another.**—Possession of a part of an entire tract of land, under color of title for the whole, will be possession of all of the tract not in the adverse possession of another. Where a person enters into the actual possession of a part of an entire tract, which was vacant and unoccupied at the time, under a conveyance for the whole, his possession will be regarded as embracing all the land called for in his deed. But possession of a part, only, of an entire tract, even under a deed for the whole, will not extend to and embrace another portion in the adverse possession of another.²

A deed containing the following description of lands, viz.: "The southeast quarter of the southeast quarter, north of range five, west of the third principal meridian, in the district of lands subject to sale at Springfield, containing forty acres, according to the official plat of the survey of said lands returned to the general land office by the surveyor general," was held void and not sufficient as color of title upon which to base a constructive possession. *Shackleford v. Bailey*, 35 Ill. 387.

In an action of ejectment to recover a strip off a lot of ground, the plaintiff showed color of title for the whole lot, and also proved the payment of all taxes thereon for seven successive years, under such color of title, but failed to show any possession of such strip at any time: *Held*, that the evidence did not authorize a recovery, and that the court properly instructed the jury to find for the defendant. *Whitford v. Drexel*, 118 Ill. 601 (1886).

§ 23. **Defendant's Possession Admitted by Plea, etc.**—The execution, delivery and acknowledgment of a deed are by statute made to have the force and effect of livery of seizin, and constitute some evidence of seizin in the grantee, and therefore, in the absence of all proof on the part of the tenant, may avail. The plea of *nul disseizin* so far admits the tenant's claim to have the freehold, that it is not incumbent on the demandant to prove the tenant's possession.³

§ 24. **Possession Delivered to the Plaintiff.**—This is effected by the writ of possession, which is usually drawn up in general terms, commanding the sheriff to give to the plaintiff

¹ *Livingstone v. Peru, etc., Co.*, 9 ² *Whitford v. Drexel*, 118 Ill. 601
Wend. (N. Y.) 517; *Kent v. Harcourt*, (1886).

33 Barb. (N. Y.) 498; *Shackleford v.* ³ *Burridge v. Fogg*, 62 Mass. 184
Bailey, 35 Ill. 387; *Humphries v.* (1851); *Ward v. Fuller*, 15 Pick.
Huffman, 33 Ohio St. 404; *Henly v.* (Mass.) 185.

Wilson, 81 N. C. 405.

"the possession of his term, of and in the premises recovered in the ejectment," but without any particular specification of the lands whereof he is to make execution; and as the description of the premises, in the demise in the declaration, is also too general to serve as a direction to the sheriff, it is the practice for the plaintiff, at his own peril, to point out to the sheriff the premises whereof he is to give him possession; and if he take more than he has recovered in the action, the courts will interfere in a summary manner, and compel him to make restitution.¹

Where the plaintiff, judgment being by default on a writ of possession, took possession of the whole premises, it appearing that he had no title to three-sixths, he was ordered to restore so much to the defendant. *Jackson v. Stiles*, 5 Cow. (N. Y.) 418.

In ejectment, where the declaration, verdict and judgment are general, the plaintiff may take possession, at his peril, to any extent which he chooses, under the writ of possession, subject to be put right by the court, if he takes too much. *Jackson v. Rathbone*, 3 Cow. (N. Y.) 291.

But where the judgment is upon a special verdict, describing the premises, the plaintiff is confined to such location in the first instance, and the sheriff may refuse to give him possession beyond it. *Ib.*

"In executing the writ of possession, the plaintiff acts at his peril; and if he takes more than he has established his right to, the court will interfere in a summary way, and compel him to make restitution." *Green, J., Camden v. Haskill*, 3 Rand. (La.) 465.

The court, in their discretion, will set aside a writ of *habere facias possessionem* executed, and let in a landlord to try an ejectment on suggestion of collusion. *The Grocers Company v. Roe*, 5 Taunt. 205.

A sheriff's return to a rule to show cause why he should not execute a writ of *habere facias* showed that the premises were occupied by one H., not a party to the action, under a claim of title paramount. This also appeared by H.'s return to the rule, and also that he was in possession under such claim of title when the action was brought; but the court made the rule absolute, and directed the sheriff to proceed to execute the writ against H. *Held*, error. H. could not be ejected without a day in court. *Hessel v. Fritz*, 124 Pa. St. 229; 16 Atl. Rep. 853, W. N. C. 299 (1889).

¹ *Adams on Ejectment*, 411; *Saul v. Dawson*, 3 Wils. 49; *Drapers' Comp. v. Wilson*, 2 Stark. 477.

CHAPTER XIV.

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§ 1. **Muniments of Title—Classes of Estates.**—In one thing all writers agree, and that is, in considering that there are two modes only, regarded as classes, of acquiring title to land, namely descent and purchase; purchase includes any mode of acquisition known to the law except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law.¹ Estates by purchase are by some writers divided into two classes: (1) those created by act

¹3 Washburn on Real Property, 4; 2 Black. Com. 241; James v. Morey, 2 Cow. (N. Y.) 290.

of law and (2) those created by act of parties. The titles to estates by purchase with few exceptions rest in written evidence. These written evidences are known in the books as muniments of title.¹

§ 2. **Muniments of Title—The Term Defined.**—The instruments of writing and written evidences which the owner of lands, possessions, or inheritances has, and by which he is enabled to defend the title of his estate.²

§ 3. **The Mode of Transferring Real Estate.**—The question of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the State in which the land lies. The mode of conveyance is subject to the control of the Legislature of the State.³

§ 4. **The Law of the Place Governs the Manner of Transferring Titles.**—It is familiar doctrine that the law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos*. In most of the States of the Union, a will of real property must be admitted to probate in some one of their courts before it can be received elsewhere as a conveyance of such property. But by the law of Maryland, which joins on the District of Columbia, wills, so far as real property is concerned, are not admitted to such probate. The common law rule prevails on that subject. The Orphans' Court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also, but the probate is evidence of the validity of the will, only so far as the personal property is concerned. As an instrument conveying real property, the probate is not evidence of its execution. That must be shown by the production of the instrument itself, and proof by the subscribing witnesses, or, if they be not living, by proof of their handwriting.⁴

The act of Congress declaring the effect to be given in any court within the United States to the records and judicial pro-

¹ 2 Flint, Real Property, 446; 4 Kent Sullivant, 23 U. S. (10 Wheat.) 192; Com. 373, note. U. S. v. Fox, 94 U. S. 315; Brine v.

² 2 Bouvier's Law Dictionary, 193. Hartford F. Ins. Co., 96 U. S. 627;

³ Langdon v. Sherwood, 124 U. S. Conn. Mut. L. Ins. Co. v. Cushman, 74 (1887); U. S. v. Crosby, 11 U. S. 108 U. S. 51.

(7 Cranch.) 115; Clark v. Graham, 19 ⁴ Robertson v. Pickrell, 109 U. S. U. S. (6 Wheat.) 577; McCormick v. 1050 (1883).

ceedings of the several States, does not require that they shall have any greater force and efficacy in other courts, than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle, and would contravene the policy of the provisions of the constitution and laws of the United States on that subject.¹

§ 5. Deeds of Conveyance as Muniments of Title—A Deed Defined.—Lord Coke defined a deed to be a writing, sealed and delivered by the party thereto and containing a contract, executory or executed.² In this connection deeds of conveyance of real estate only are to be considered.

§ 6. The Essentials of a Deed of Conveyance.—The essentials in law of a sufficient deed are:

- (1.) It must be in writing.
- (2.) Proper parties, grantor and grantee.
- (3.) The subject of the conveyance, or the land to be transferred.
- (4.) The consideration.
- (5.) The execution.
- (6.) Delivery and acceptance.

§ 7. It Must Be in Writing.—The deed must be in writing and it seems to be the accepted opinion of the authorities that in order to be valid, it must be written on paper or parchment. The reasons assigned for this requirement of the law are that deeds written upon any other material would not be so durable and easy to be erased or altered.³ It must contain all the statements necessary to make up all the requisites of the deed, for defects and omissions can not be supplied by parol evidence. But mistakes of rhetoric, bad grammar and poor spelling will not render the deed invalid if the intention can be gathered from the writing.⁴

§ 8. Origin of the Law—The Statute of Frauds.—Prior to June 24, 1677, when the English statute of frauds took effect,

¹ Robertson v. Pickrell, 109 U. S. 529. ³ 5 Am. & Eng. Ency. of Law, 423; 1050 (1883); Board of Public Works 3 Washburn Real Prop. 240; Coke on v. Columbia Coll., 17 Wall. (U. S.) Littleton, 35 b; 2 Black. Com. 259.

² Coke on Littleton, 171 b; 5 Am. 237; 3 Washburn on Real Prop. 240; and Eng. Ency. of Law, 423; 3 Wash. 5 Am. & Eng. Ency. of Law, 424. Real Prop. 239; Hutchins v. Byrnes, 9 Gray (Mass.), 198.

English land was transferable by word of mouth, with livery of seizin.¹ The third section of this statute provided: "And, moreover that no leases, estates or interests, either freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the said four and twentieth day of June be assigned, granted or surrendered unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."²

Questions under this statute can seldom arise at this day in the American courts.

§ 9. **The Parties—Grantor and Grantee.**—*The grantor:* In every valid conveyance of real estate there must be a competent grantor. He must be the owner of the property and have the capacity to sell and convey it. All owners of property, excepting such as are under some legal disability, have power to sell and convey their lands.

Among these legal disabilities are infancy and insanity, which are sometimes classed as temporary disabilities, and idiocy and the like, which are also sometimes classed as permanent disabilities. The deeds of infants and insane persons are generally held to be voidable and not void,³ and may be ratified or disaffirmed, in the case of an infant upon his becoming of lawful age, and in case of insane persons when they are restored to mental sanity.⁴ Deeds of insane persons and probably habitual drunkards, and like persons, while under guardianship on account of their mental disability, are absolutely void.⁵ What degree of mental disability is sufficient to deprive a person of the power to make a valid conveyance of real estate is often a question of great difficulty, but it seems that

¹ 2 Bl. Comm. 297; 1 Steph. Comm. Ency. Law, 426; 2 Black. Conn. 291; (8th Ed.) 502, 505; Williams, Real Prop. (12th Ed.) 147; City of Boston v. Richardson, 13 Allen, 146; Spurr v. Bartholomew, 2 Metc. 479; Rust v. Boston Mill Corp., 6 Pick. 158.

² 29 Car. II, C. 3; Sanger et al. v. Merritt, 120 N. Y. 109; 24 N. E. Rep. 386.

³ 2 Kent Com. 236; 5 Am. & Eng. 3 J. J. Mar. (Ky.) 658.

⁴ Washburn on Real Property, 250; Emmons v. Murry, 16 N. H. 385; 5 Am. & Eng. Ency. Law, 427.

⁵ Griswold v. Butler, 3 Conn. 231; Wait v. Manwell, 5 Pick. (Mass.) 217; 16 Am. Rep. 391; Pearl v. McDowell,

any impairment of the faculties short of a complete inability to understand the nature of the act will not render a deed of conveyance void on the ground of mental disability.¹

§ 10. **Who May Convey Land.**—By the ancient common law all persons in possession were *prima facie* capable both of conveying and purchasing lands, tenements and hereditaments, unless the law laid them under some peculiar disabilities. But if a person had only the right of property or possession he could not convey it to another person, because, as Lord Coke said, “It is one of the maxims of the common law that no right of action can be transferred, because under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth.”² The rule that one not in possession can not convey land was founded partly upon the peculiar nature of the livery of seizin under the ancient common law and partly upon considerations of public policy. The early authorities in the New England States generally place it upon the ground lest pretended titles be purchased and law suits be promoted.”³ The old reasons have in a great measure ceased to exist and the tendency of later decision is to modify the strict rule as anciently held.⁴ In many States the doctrine is abolished by statute. As an example we cite the statute of Illinois.

“Any person claiming right or title to lands, tenements or hereditaments, although he, she or they may be out of possession, and notwithstanding there may be an adverse possession thereof, may sell, convey and transfer his or her interest in and to the same, in as full and complete a manner as if he or she were in the actual possession of the lands and premises intended to be conveyed; and the grantee or grantees shall have the same right of action for the recovery thereof, and shall in all respects derive the same benefit and advantage therefrom, as if the grantor or grantors had been in the actual possession at the time of executing the conveyance.”⁵

§ 11. **The Present State of the Common Law.**—In the absence of statutory provisions the present state of the common law may be stated as follows: “If a person who is disseized conveys land, and the disseizin abandons the posses-

¹ *Dennett v. Dennett*, 44 N. H. 538; *omew*, 6 Pick. (Mass.) 409; *McMahan Burgess v. Pollock*, 53 Iowa, 273; 36 Am. Rep. 218; 5 Am. & Eng. Ency. of Law, 426. ⁴ *Sparhawk v. Bogg*, 16 Gray (Mass.), 583.

² *Blackstone Com.* 290; *Coke on Littleton*, 214. ⁵ *R. S. Ill.* 1845, 103, § 4; *R. S.* 1883, 279, § 4.

⁴ *Dane Ab.* 8; *Ward v. Barthol-*

sion, and the grantee enters and occupies it, he acquires an indefeasible title. He thus acquires an actual seizin under a title which his grantor is estopped by his deed to deny, and a stranger who subsequently disseizes him can not set up the invalidity of his deed.

"If the disseizor abandons his possession, and the grantee does not enter into actual occupation, but the land is vacant, there is no reason why the same result should not follow. Livery of seizin, necessary at common law, is not required under our laws. Delivery of the deed is delivery of seizin unless the land is adversely occupied at the time.

"If it is, and the disseizor abandons his possession, it inures to the benefit of the grantee, and gives him a seizin, so that he has a title which is valid against a stranger who subsequently disseizes him."¹

§ 12. The Grantor Under Disability of Fraud and Duress.—The execution of the deed must be the voluntary act of the grantor. If he has been compelled by duress or induced by fraud to execute the deed he may avoid it upon returning, or offering to return the consideration within a reasonable time after the removal of the duress or discovery of the fraud.²

§ 13. The Parties, Grantor and Grantee.—*The grantee:* As a general rule all persons are capable of holding real estate and so may be a grantor in a deed of conveyance.³ There are, however, some exceptions to this rule. By the common law rule an alien could not hold land as against the king, but it seems that he could as against his subjects. The rule, however, has been abolished in most of the States. Foreign corporations are generally prohibited from holding land.

§ 14. The Subject of the Conveyance.—To make a valid deed there must, of course, be real estate to be transferred and it must be described therein with reasonable certainty so as to admit of easy identification.

¹ Morton, J., in *McMahan v. Bowe*, Black. Comm., 291; *Deputy v. Staple*, 114 Mass. 140 (1873); *Sparhawk v. Ford*, 19 Calif. 302; *Bassett v. Brown*, Bogg, 16 Gray (Mass.), 583; *University*, 105 Mass. 551.

v. Joslyn, 21 Vt. 52; *Farnum v. Peterson*, 111 Mass. 148; *Livingston v. Proseus*, 2 Hill (N. Y.), 526; *Cleveland v. Flagg*, 4 Cush. (Mass.) 76; *Wade v. Lindsey*, 6 Met. (Mass.) 407.

² *Washburn on Real Property*, 267; *Spencer v. Carr*, 45 N. Y. 410; *Rivord v. Walker*, 39 Ill. 413; *Cecil v. Beaver*, 28 Iowa, 241; 5 Am. & Eng. Ency. of Law, 430.

³ *Washburn on Real Prop.* 260; 2

§ 15. **The Consideration.**—As a general proposition it may be stated that a consideration either good or valuable, is necessary in order to pass the title to real estate, and so is, in reality, one of the essentials of a valid deed. But contracts under seal are valid without a consideration, or perhaps more properly speaking the seal in itself imports a sufficient consideration though none be mentioned in the instrument.¹

§ 16. **Fraud as a Defense—The Consideration of a Deed Not an Element of Inquiry in a Court of Law.**—Fraud and circumvention used in the procurement of a deed or the fact that it was executed upon the belief that it was another paper, or that it was misread and its contents falsely stated, may be proved in an action of ejectment, but the consideration is not an element of inquiry, especially in those States where two distinct systems of jurisprudence prevail, one of law and one of equity. Courts can not abolish this distinction, however technical it may be. Under this system the action of ejectment is one of law; the only plea is, not guilty of unlawfully withholding the premises, and no notice is given that fraudulent representations concerning the consideration of a deed will be urged as a defense. The sudden springing of such a defense upon the trial would operate as a surprise, and to mar the system of common law pleading, which intends that a party must have some notice of the questions which he is to meet on the trial.

As a general rule, then, in those jurisdictions where law and equity prevail in distinct systems, in an action of ejectment a court of law will not go behind the naked legal title. For this course there is good reason. If the evidence offered is admitted and the fraud found, the court can do nothing but declare the deed a nullity. It can not place the parties in their original position and compel a restoration of the money paid and a reconveyance of the lands granted in exchange. Equity could not be administered as it would be in a court of chancery, to which the jurisdiction of such questions rightfully pertains.²

¹ 1 Bouvier's Law Dic. 278.

290; Ousterhout v. Shoemaker, 3

² Thornton, J., in Escherrick v. Hill (N. Y.), 513; Taylor v. King, 6 Traver, 65 Ill. 379 (1872); Reece v. Munf. (Va.) 366; Dickerson v. Evans, Allen, 5 Gil. (Ill.) 236; Jackson ex dem. Church v. Hills, 8 Cow. (N. Y.)

§ 17. **The Execution of the Deed.**—By the execution of the deed is meant the various formalities required by law for the completion of it, the signing, sealing, and acknowledgment.¹

§ 18. **Signing.**—Since the passage of the statute of frauds every deed must be signed by the grantor, and if the statute requires the deed to be subscribed by the grantor, he must sign it at the end, otherwise his signature in any other part of the writing will suffice. If he is unable to write his name, another may do it at his request in his presence, or he may by affixing a mark to the signature adopt it as his own.²

§ 19. **The Seal.**—The definition and character of a seal as a requisite to a deed are well settled. (1) At common law a private seal is an impression upon wax or wafer or some other tenacious substance capable of being impressed.³ Lord Coke said it was “wax with an impression.”⁴ An impression upon paper alone is not a seal, except where it has been made so by statute,⁵ and a scrawl at the end of a name is not a seal at common law. But a piece of paper affixed with mucilage and stamped with a permanent impression is good as a common law seal.⁶ The common law seal and the use of rings and signets for the purpose and by the way of signature and authenticity is corroborated by the usages and records of all antiquity, sacred and profane.⁷ In some few States, notably in New York and Mississippi, the seal seems to have retained its original character in the authentication of deeds.⁸ But in most of the States it has fallen into disuse or is abolished by statutory enactments. As an illustration we quote the statute of Iowa.

The use of private seals in written contracts (except the seals of corporations) is hereby abolished, and the addition of a private seal to an instru-

¹ 5 Am. & Eng. Ency. Law, 440.

376; Warren v. Lynch, 5 Johns. (N.

² Truman v. Lose, 14 Ohio St. 154; Y.) 239; Bank v. Gray, 2 Hill (N. Y.), Frost v. Deering, 21 Me. 156; Wood 227; Farmers, etc., Bank v. Haight, v. Goodridge, 6 Cush. (Mass.) 117; 3 Hill (N. Y.), 493.

Bartlett v. Drake, 100 Mass. 175.

⁶ Gillespie v. Brooks, 2 Redf. (N. Y.)

³ Lightfoot v. Butler, 2 Leon. 21; 349.

Warren v. Lynch, 5 Johns. (N. Y.) 376; Cicero Acad. Q. Lucul. 426; Heinec. 239; Andrews v. Heriot, 4 Cow. (N. Elem. Jur. Civ. 497; Book 11, L. C. Y.) 408; Perk. Conv. Sec. 134; Bro., P. Co. 950, note; Genesis, 33, 18; Ex- Tit. *Faits*, 17, 30; Book 11, L. C. P. odus 28, 11; Esther 8, 10; Jeremiah, Co. 950, note. 22, 10.

⁴ Institutes, 169.

⁸ Rev. Code Miss. 1824; Warren v.

⁵ Coit v. Milliken, 1 Den. (N. Y.) 197; Lynch, 5 Johns. (N. Y.) 239.

ment of writing hereafter made shall not affect its character in any respect.¹

An actual seal, not mere words or lines, stamped upon paper of sufficient tenacity to receive and retain the impression, must be deemed technically and strictly a seal.² (2) Under statutes: The States of New Jersey, Delaware, Virginia, Ohio, Kentucky, Michigan, Indiana, Illinois, and probably some others, have provided by statute that the scroll may supply the place of the seal.³

As an illustration, we quote the statute of Illinois:

§ 1. * * * Any instrument of writing to which the maker shall affix a scrawl by way of seal shall be of the same effect and obligation, to all intents, as if the same were sealed.⁴

§ 20. **Legal Effect of the Seal, etc.**—At common law a seal was necessary to convey a legal title, but without the seal an instrument in writing may convey the title in equity. It is not necessary that each grantor affix a separate seal. One seal will suffice for several.⁵ Thus, if two persons sign an instrument, and a seal is affixed opposite the name of one, it will be considered the seal of both, if it is shown to have been fixed by authority of both;⁶ but when a person places his signature opposite a seal already made, whether printed or written, he thereby makes it his own.⁷

If an instrument purports to be sealed by all the signers, but has fewer seals upon it than signatures, it will be deemed a valid sealed instrument as to all.⁸

A scrawl affixed to a partnership signature of a firm name by one member, with authority, has the effect of a seal of all the

¹ Rev. Code Iowa, 1860, § 1823.

² *Pillow v. Roberts*, 13 How. (U. S.) 472; *Hemp*, (U. S. C. C.) 624; *Follett v. Rose*, 3 McLean (U. S. C. C.), 332; *Ross v. Bedell*, 5 Duer (N. Y.), 462; *Curtis v. Leavitt*, 17 Barb. (N. Y.) 399; *Bank v. Gray*, 2 Hill (N. Y.), 227.

³ R. S. Ill. 1845, 421, § 56; R. S. Ill. 1889, 335, § 1. The law applies to deeds of conveyance of land. *Deinger v. McConnell*, 41 Ill. 227.

⁴ *Sir W. Jones*, 268; *Ludlow v.*

Simmons, 2 Cai. Cas. (N. Y.) 1, 7, 42, 55; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Townshend v. Hubbard*, 4 Hill (N. Y.), 351.

⁵ *Van Alstine v. Van Slyck*, 10 Barb. (N. Y.) 383; *Perkins on Conveyances*, 59, § 134.

⁶ *Ankeney v. McMahon*, 3 Scam. (Ill.) 12.

⁷ *Davis v. Burton*, 3 Scam. (Ill.) 41; *McLean v. Wilson*, 3 Scam. (Ill.) 50.

members," and brackets, thus [], annexed to a signature were given the effect of a scrawl.²

Where a paper is described in the body of it as sealed, and the letters "L. S." are either written or printed opposite the signature of the person signing it, it is a sealed instrument within the meaning of a statute authorizing the use of a scrawl instead of a seal.³

§ 21. **Requisites of a Sealed Instrument.**—To constitute a sealed instrument it seems to be necessary that it should be so expressed in the body,⁴ but it will be found that the authorities upon this question are not uniform.⁵

§ 22. **The Acknowledgment.**—The acknowledgment of a deed is defined to be the act of a person who has executed a deed in going before some competent officer or court, and declaring it to be his or her act or deed, together with the certificate of the officer that it has been so acknowledged.⁶ The certificate of the officer is legal evidence of the execution of a deed.⁷ The official character of the person taking the acknowledgment must appear in the certificate, and when so appearing is *prima facie* evidence of his authority⁸ and jurisdiction,⁹ and in the absence of fraud is conclusive of the facts recited.¹⁰

§ 23. **Its Sufficiency Tested by the General Rule.**—Whenever the substance of the statutory requirements is found in a certificate of acknowledgment, obvious clerical and technical

¹ Ankeney v. McMahon, 3 Scam. (Va.) 446; Clegg v. Lemesurier, 15 (Ill.) 12 (1841). Gratt. (Va.) 108; Skrine v. Lewis, 68

² Eames v. Preston, 20 Ill. 389.

³ Ankeney v. McMahon, 3 Scam. (Ill.) 12 (1841).

⁴ 1 Daniel Neg. Inst. § 32; Cartmill v. Hopkins, 2 Mo. 220; Boynton v. Reynolds, 3 Mo. 79; Grimsley v. Riley, 5 Mo. 280; Walker v. Kiler, 8 Mo. 301; Moreau v. Detchemendy, 41 Mo. 431; Groner v. Smith, 49 Mo. 318; Peasley v. Boatwright, 2 Leigh. (Va.) 195; Cromwell v. Tate's Ex'rs, 7 Leigh. (Va.) 301, 305; Baird v. Blagrove, 1 Wash. (Va.) 170; Argenbright v. Campbell, 3 H. & M. (Va.) 144, 174; Austin v. Whitlock, 1 Munf. (Va.) 487; Jenkins v. Hart, 2 Rand.

⁵ Thrasher v. Everhart, 3 Gill & J. (Md.) 234, 246.

⁶ Bouvier's Law Dic., Tit. Acknowledgment.

⁷ Young v. Duvall, 109 U. S. 573.

⁸ Trustees v. McKechnie, 90 N. Y. 618; Belo v. Mayer, 79 Mo. 67; Harding v. Curtis, 45 Ill. 252; Carpenter v. Dexter, 8 Wall. (U. S.) 513; Boze v. Arper, 6 Minn. 222.

⁹ Bradley v. West, 60 Mo. 33; Rockleff v. Morton, 19 Me. 274.

¹⁰ 1 Am. & Eng. Ency. Law, 148; Young v. Duvall, 109 U. S. 573; Paxton v. Marshall, 18 Fed. Rep. 361.

omissions and defects will be disregarded, and in order to uphold it the certificate will be read in connection with the instrument to which it is connected, and in the light of surrounding circumstances.¹

An application of the rule.

“STATE OF MICHIGAN, County of Calhoun, ss.:

On this sixth day of November, 1843, personally came before me John Van Arman and Amanda Van Arman, known to me to be the persons described in, and who executed, the foregoing instrument, and acknowledge the execution thereof. And the said Amanda, being examined by me separate from her husband, acknowledged that she executed the same for the purposes in it specified *with* fear or compulsion of any person.

ELI L. STILLSON,
Notary Public.”

In determining the sufficiency of this acknowledgment the Supreme Court of Michigan said: “The ground of the objection to this certificate of acknowledgment is, as argued by counsel, ‘that it does not state the wife executed such deed without any fear or compulsion of her husband.’ When the words are added which were omitted through a mere clerical mistake, the acknowledgment is sufficient, and these may and ought to be added in construing the instrument. There can be no doubt but that the word ‘with’ was intended by the notary to be ‘without,’ and, when the circumstances under which it was made are known and considered, any other construction would be not only unreasonable but stupid. With this modification of the certificate, I hardly think the learned counsel for plaintiff would still regard it as insufficient. It surely would not be. The circumstances surrounding the execution of this deed and the making of this certificate are most unfavorable to the views taken by counsel for the plaintiff. The husband of Mrs. Van Arman was one of the leading lawyers in the State, and the notary who took the acknowledgment was also a lawyer in good repute, and nothing appears showing or tending to show that a good and valid deed, properly acknowledged by Mrs. Van Arman, sufficient to convey her interest, was not intended, and nothing is shown as occurring since it was made, before the commencement of this suit, indicating that it was not regarded as a perfect and valid instrument, and conveying Mrs. Van Arman’s interest in the property described in the deed.” *King v. Merritt*, 67 Mich. 194; 34 N. W. Rep. 694.

¹*King v. Merritt*, 67 Mich. 194; 34 Wells v. Atkinson, 24 Minn. 165; N. W. Rep. 689 (1887); *Morse v. Hewitt*, 28 Mich. 481; *Brown v. McCormick*, 28 Mich. 215; *Nelson v. Graff*, 44 Mich. 438; 6 N. W. Rep. 872; *Ford v. Ford*, 33 N. W. Rep. 188; *Taylor v. Youngs*, 48 Mich. 268; 12 N. W. Rep. 208; *Sparrow v. Hovey*, 41 Mich. 708; 3 N. W. Rep. 198; *Brunswick v. Brackett*, 33 N. W. Rep. 214; *Chandler v. Spear*, 22 Vt. 407; *Carpenter v. Dexter*, 8 Wall. (U. S.) 528; *Gorman v. Stanton*, 5 Mo. App. 585; *Johnson v. Badger*, 13 Nev. 351; *Scharfenburg v. Bishop*, 35 Iowa, 61; *Muller v. Boone*, 63 Tex. 91; *Donahue v. Mills*, 41 Ark. 421; *Gordon v. Leech*, 81 Ky. 229.

§ 24. **Married Women—Execution of Deed—Compliance with the Statutes.**—The execution of a deed by a married woman is manifested by her signature and seal to it, but it is not consummated so as to bind her, until she acknowledges it before a proper officer as required by law. The term “executed” can not embrace the delivery, for that is the last act done, and follows the acknowledgment, and is no part of the execution of the deed. When, therefore, she acknowledges that she signed the deed, she admits her signature and seal, which is, technically, the execution of the deed. It is sufficient if it appear that the statute has been substantially complied with; a mere literal compliance is not demanded or expected.

The great object which the legislature appears to have had in view in prescribing the mode by which a married woman may be divested of her interest in land, seems to be, that she should not be imposed upon or coerced by her husband, and to protect her from imposition and coercion, the officer when required by the statute must examine her separate and apart from her husband, and explain to her the nature of the act she is about to consummate. It is the design of these laws, that she should be informed of her true position and of the real nature of her interest in the land she is about to convey, and this is presumed to have been done by the officer when it is so stated in his certificate. When this appears from the certificate slight departures from the words of the statute will not invalidate it so long as the substance is preserved; mere technical objections will not be favored.¹

§ 25. **Surplusage Does Not Vitate the Acknowledgment.**—Redundancy is a very uncommon objection to a certificate of acknowledgment. The complaint has been generally, if not universally, that essential parts required by statutes have been omitted. But when all which the statutes do require to effectuate the purpose claimed for the deed, is in the acknowledgment, and also something else is put in which the statutes do not require, we can not believe that the courts would be administering the spirit of the statutes or the principles of justice, to hold that the useless redundancy in the acknowledg-

¹ Stewart v. Dutton, 39 Ill. 93 (1866); Hughes v. Lane, 11 Ill. 123.

ment invalidated the deed. It should simply be regarded as surplusage.¹

§ 26. **Deeds Good Without Acknowledgment—Exception.**—A sheriff's deeds and all other deeds except that of a married woman, are good without acknowledgment, and if the signature is proven to be the genuine signature of the person described in the deed as having executed the same, it will be competent and legitimate evidence.²

§ 27. **Delivery and Acceptance.**—The last requisite of the deed is its delivery by the grantor and its acceptance by the grantee. These are essential requisites to every deed and without which no title passes.³ When a deed is in the possession of the grantee, a delivery and acceptance will be presumed, but the presumption may be rebutted by showing that such possession was obtained without the consent of the grantor or without his intention to make a delivery.⁴

What acts constitute a legal and sufficient delivery of a deed is frequently a very difficult question to determine. The intention of the grantor must control, and such intention may be made manifest by actions as well as words.⁵

A deed of land takes effect only from its delivery, although signed, sealed and acknowledged; if it be not actually delivered by the grantor during his life nothing passes by it.⁶

§ 28. **A Delivery and Acceptance Essential to the Solidity of a Deed—The Rule Qualified.**—As a general principle, both delivery and acceptance are essential to the validity of all deeds conveying land, but the principle is to be understood with some qualification, as in the case of infants and

¹ Caton, C. J., in *Chester v. Rumsey*, *Morris v. Henderson*, 37 Miss. 501; 26 Ill. 99 (1861).

² *Stephenson v. Thompson*, 13 Ill. 186; *Winstanley v. Meachem*, 58 Ill. 97 (1871). *Roberts v. Swearingen*, 8 Neb. 363; *Woolverton v. Collins*, 34 Iowa, 238; *Black v. Shreve*, 13 N. J. L. 457; *Roberts v. Jackson*, 1 Wend. (N. Y.)

³ *Cook v. Brown*, 34 N. Y. 476; 478; 5 Am. & Eng. Ency. of Law, *Johnson v. Farley*, 45 N. H. 510; 447.

Fisher v. Beckwith, 30 Wis. 55; 11 Am. Rep. 546; *Hulick v. Scoville*, 9 Ill. 175; *Overman v. Kerr*, 17 Iowa, 28; *Penn. Co. v. Dorey*, 64 Pa. St. 486; *Younge v. Gibbeau*, 3 Wall. (U. S.) 641; *Fairbanks v. Metcalf*, 8 Mass. 230. ⁵ *Sciugham v. Wood*, 15 Wend. 545; *Mills v. Gore*, 20 Pick. (Mass.) 260; *Stewart v. Ward*, 11 Ind. 92.

⁶ *Jackson v. Leck*, 12 Wend. (N. Y.) 105.

⁴ *Little v. Gibson*, 39 N. H. 505;

lunatics, either of whom may be grantees, but neither of whom can signify acceptance.

In no case, whether the grantees be infants or adults, is a formal delivery and acceptance essential, though there must be acts shown evincing such intentions. The intention of the party is the controlling element in contracts of this character, and whenever it is manifest, by facts and circumstances, that the grantor in delivering a deed to the recorder to be placed on record without any explanation, intended to part with his title, the presumption is, and should be, that he then delivers it for the benefit of the grantee, and it should and will take effect from that moment, an acceptance by the grantee being presumed from the beneficial nature of the transaction. How useless would be a delivery to, and how impossible an acceptance by, an infant one day old, or a lunatic.

In such cases, courts are bound to hold the conveyance beneficial to such persons, and this, although the grantee had not authorized and could not authorize the recorder or other person to receive it, and was at the time, wholly ignorant of its execution. The great question is, did the grantor, by the execution of the deed and placing it on record, intend thereby to part with his title absolutely and vest it in another, without any intention to resume it, or expectation of deriving a benefit from an interest still remaining in him in the land?¹

§ 29. Deeds Absolute on Their Face Prevail in Courts of Law.—A deed of conveyance absolute upon its face may in point of fact be a mortgage. But in those States where law and equity exist in separate systems, a court of law, upon the trial of an action of ejectment, will not stop to hear evidence, as to whether a conveyance, absolute on its face, was or was not intended by the parties to be a mere mortgage security. The remedy of the grantee in such a deed is in equity. He may there file his bill, and enjoin the ejectment suit, and show the true character of the instrument. A court of chancery has full power to protect his rights. The refusal of a court of law to receive testimony offered for the purpose of showing its true character is not erroneous.²

¹Breese, J., in *Matterson v. Creek*,
23 Ill. 75 (1859).

²*Finlon v. Clark*, 118 Ill. 33 (1886);
Webb v. Rice, 6 Hill (N. Y.), 219;

§ 30. **A Deed Absolute May be Shown to be a Mortgage.**—A deed absolute upon its face, and though registered as a deed, will be valid and effectual as a mortgage between the parties, if it was intended by them to be merely a security for a debt, and this will be so though the defeasance is by an agreement resting in parol, for parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud, surprise or mistake.¹

§ 31. **A Warranty Deed Raises a Presumption of Title.**—It is a well settled rule in the law of real property, that a warranty deed of land, duly executed and recorded, raises a presumption that the grantor had a title which he could convey, and that he has by his deed vested a seizin in the grantee. In the absence of adverse possession, seizin follows the legal title, and seizin in law carries with it the legal possession.²

§ 32. **Defective Deeds, etc., Competent to Show Possession, etc.**—When the title of the plaintiff is based upon possession under claim of title for the period required by statute, deeds under which his ancestor or deviser claimed, and the plats of the premises in controversy, are competent and admissible to show possession under these by such grantor or deviser and his grantors, and to show that the premises were known by the name or description stated in the complaint or declaration.

Bragg v. Massie, 38 Ala. 89, 106; Bryant v. Crosby, 36 Me. 563; see Richardson v. Woodbury, 43 Me. 206; *contra*, Hanway v. Thompson, 14 Tex. 142.

¹ Babcock v. Wyman, 60 U. S. (19 How.) 239 (1856); 4 Kent, Commentaries, 143; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 355; Fay v. Fay, 2 Hay (N. C.) 141; Douglas v. Culverwell, 3 Giff. 251; Lincoln v. Wright, 4 De G. & J. 16; Weathersley v. Weathersley, 40 Miss. 462, 469; Reitenbrogh v. Ludwick, 31 Penn. St. 131, 138; Hodges v. Tennessee M. & F. Ins. Co., 8 N. Y. (4 Seld.) 416; Russell v. Southard, 12 How. 139; Hills v. Loomis, 42 Vt. 562; Jenkins v. Eldredge, 3 Story, 292, 293; Brainerd v. Brainerd, 15 Conn. 575; McIntyre

v. Humphreys, 1 Hoff. Ch. 31; Story, J., in Taylor v. Luther, 2 Sum. 232; Flagg v. Mann, 2 Sum. 538; Hunt v. Rousmaniere, 1 Pet. (U. S.) 1; Slee v. Manhattan Co., 1 Paige, 48; Murphy v. Trigg, 1 Mon. 72; Clark v. Henry, 2 Cow. 324; James v. Johnson, 6 Johns. Ch. 417; Strong v. Stewart, 4 Johns. Ch. 167; Washburne v. Merrills, 1 Day, 139; Marks v. Pill, 1 Johns. Ch. 594; Lord Hardwicke in Dixon v. Parker, 2 Ves. Sen. 225; Maxwell v. Montacute, Prec. in Ch. 526; see Osgood v. Thompson Bank, 30 Conn. 27.

² Farwell v. Rogers, 99 Mass. 33 (1868); Proprietors, etc. v. Call, 1 Mass. 484; Ward v. Fuller, 15 Pick. 185; Second Precinct v. Carpenter, 23 Pick. 131; Towne v. Butterfield, 97 Mass. 105.

For this purpose such deeds and plats are not liable to the objection that by reason of defects they are not competent for the purpose of showing paper title.¹

§ 33. **Surrender and Destruction of Title Deeds.—Effect of.**—The surrender by the grantee to the grantor of an unrecorded deed, or its destruction, will not operate to revest the grantor with the title. Upon the delivery of a deed of conveyance, the title vests in the grantee. It is quite immaterial as between him and his grantor what becomes of the deed. The law points out the mode in which the title may be divested or revested in the grantor, and a mere surrender of the instrument of conveyance is not one of them.²

There are, however, a few cases to be found in the books holding that the surrender or destruction of a title deed may, under certain circumstances, operate to revest the estate. Thus where A, being seized and possessed of land under an unrecorded deed from B, contracted to sell to C, and for that purpose canceled B's deed, who at A's request made a new conveyance to C, it was held that C's title was valid,³ with the exception of these cases presenting a somewhat novel application of the doctrine of estoppel *in pais*. The general current of authorities will be found in accordance with the rule as stated.⁴

The question as to whether the delivering up or canceling a lease or deed operated as a surrender or extinguishment of an estate for life or for years to him who has the immediate estate in reversion or remainder seems to

¹ Johnson v. Johnson, 70 Mich. 65; rott, 14 East, 422; Harrison v. Owen, 37 N. W. Rep. 712 (1888); King v. 1 Atk. 519; 1 Shep. Touch. 141; Bull. Merrett, 67 Mich. 194; 34 N. W. Rep. N. P. 267; 3 Preston Abs. 103; Gilb. 689 (1887). Ev. 111, 112; Parshall v. Shirts, 54

² Raynor v. Wilson, 6 Hill (N. Y.), Barb. 99; Fawcetts v. Kinney, 33 469; Jackson v. Chase, 2 Johns. (N. Ala. 264; Patterson v. Geaton, 47 Y.) 84, 87; Botsford v. Morehouse, 4 Me. 308.

Conn. 550; Morison v. Gould, 7 Wend. ³ Carr v. Dudley, 10 Mass. 403; Holbrook v. Tirrell, 9 Pick. (Mass.) 105; Barrett v. Thorndike, 1 Greenl. (Me.) 24; Cheeseman v. Whittemore, 23 73; Farrar v. Farrar, 4 N. H. 191; Pick. (Mass.) 331; Anonymous, Latch, Tomson v. Ward, 1 N. H. 9; Sawyer 226 Palm. 403; Roe v. Archbishop, v. Peters, 50 N. H. 143; Blaney v. etc., 6 East, 86; Bolton v. Bishop, Hanks, 14 Iowa, 400; Parker v. etc., 2 H. Bl. 259; Doe v. Bingham, 4 Kane, 4 Wis. 12; 63 U. S. 286; 16 L. B. & Ald. 671; Nelthorp v. Doring- C. P. Co. Ed., 286, note.

ton, 2 Lev. 113; Magennis v. MacCul- ⁴ 16 L. C. P. Co. Ed. N. Y. Repts., lough, Gilb. Eq. Cas. 235; Woodward 427, note.

v. Aston, 1 Vent. 296; Perrott v. Per-

have been much discussed in England and fully settled that it does not. Since the statute of frauds, the surrender must be in writing. Coke on Littleton, 338, note 1; 20 Vin. Abr. 143, Surrender; L. Pl. 10.

§ 34. **An Undelivered Deed Surreptitiously Placed upon Record.**—Where possession of a deed, which has never been delivered, has been surreptitiously obtained and placed upon record by the grantee, nothing short of an explicit ratification of the deed, or such an acquiescence, after a knowledge of the facts, as would raise a presumption of an express ratification, can give the deed vitality. In this respect it would stand on the same footing with a forged deed. If the party relied upon the statutes of limitations, with possession under the deed, nothing less than the period required by the statute for possession would do, and certainly no less possession under the deed, with the knowledge of the grantor, would raise the presumption of ratification; and we are far from expressing the opinion that that possession would have that effect.¹

§ 35. **Conveyance by Attorney in Fact.**—In the case of a naked power of attorney to convey lands, not coupled with an interest, the law requires that every prerequisite to the exercise of that power should precede it. The party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which the validity of the deed might depend.²

§ 36. **Unrecorded Deed—Notice to Subsequent Purchasers.**—The law on the subject of notice to a subsequent purchaser seems to be well established. If he has knowledge of the unrecorded conveyance when he makes his purchase, he can not protect himself against that conveyance. He is as effectually bound by knowledge of the existence of the prior deed as he is by its registration. It is deemed an act of fraud in him to take a second deed under such circumstances. And whatever is sufficient to put him on inquiry as to the rights of others, is considered legal notice to him of those rights. He is chargeable with knowledge of such facts as might be ascertained by the exercise of ordinary diligence and understand-

¹ Caton, C. J., in *Hadlock v. Hadlock* (1889); *Williams v. Peyton*, 17 U. S. lock, 22 Ill. 388 (1859). (4 Wheat.) 77; *Ransom v. Williams*,

² *Deputron v. Young*, 134 U. S. 241 69 U. S. (2 Wall.) 313, 319.

ing. The actual possession of land is notice that the possessor has some interest therein. A party who purchases the same while that possession continues, takes the premises subject to that interest, whatever it may be. The possession is sufficient to put him on inquiry as to the title of the possessor; and it is his own fault if he does not ascertain the extent and character of that title. Where the purchaser, under an unregistered conveyance, is in the open and visible possession of the premises, it is deemed sufficient notice to protect him against a subsequent purchaser, and to charge the latter with knowledge of his title.¹

§ 37. **Infant not Estopped by Statements in Deed.**—The rule seems well settled that an infant having made statements in his deed of conveyance alienating his lands, in regard to his age, is not estopped from disaffirming the conveyance after he becomes of age, and recovering possession of the lands.² An infant is not estopped by anything he has said or done while under age; to so apply the doctrine of estoppel would, we think, be repugnant to the principle upon which the law protects infants from civil liabilities in general.³

Applications of the rule.

On the trial of an action in ejectment there was introduced in evidence, in defense, a deed from the plaintiff to Emily C. Cummings, in which it is recited that "Margaretha David (the plaintiff), unmarried, and of age," for \$3,500 conveys and quit-claims to Emily C. Cummings the property in question, and a deed from Emily C. Cummings to Anna C. Haas, one of the defendants. The plaintiff then introduced evidence to prove that at the date of the deed to Emily C. Cummings the plaintiff was a minor, and under the age of eighteen years, and that after coming of age she filed her disaffirmance of the deed, and a demand for possession of the premises, in the recorder's office of Cook county. There was recovery by the plaintiff, and the defendants appealed.

Sheldon, J., in offering the judgment said the question is as to the effect of the plaintiff's deed to Emily C. Cummings—whether or not plaintiff was

¹ Treat, J., *Rupert v. Mark*, 15 Ill. 541 (1854); *Tuttle v. Jackson*, 6 Wend. (1884).

213; *Colby v. Kenniston*, 4 N. H. 262; ³ *Brown v. McCune*, 5 Sandf. (N. Y.) Matthews v. Demerritt, 22 Maine, 228; *Merriam v. Cunningham*, 11 312; *Norcross v. Widgery*, 2 Mass. Cush. (Mass.) 40; *Conrad v. Lane*, 26 506; *Landes v. Brant*, 10 Howard, Minn. 389; 4 N. W. Rep. 695; *Burley* 348; *Dyer v. Martin*, 4 Scam. (Ill.) v. Russell, 10 N. H. 184; *Studwell v.* 146; *Dixon v. Doe*, 1 S. & M. 70; *Shapter*, 54 N. Y. 249; *Gilson v. Spear*, *Boling v. Ewing*, 9 Dana, 76; *Mc-* 38 Vt. 311.

Caskle v. Amarine, 12 Ala. 17.

estopped from disaffirming such deed made while she was a minor, she having stated therein that she was of age. The authorities seem abundantly to establish that a defendant is not estopped from setting up infancy as a defense to a contract, by his fraudulent representations that he was of full age. The conclusion, we think from the authorities, must follow, that the statement in the deed of plaintiff, that she was of full age, is not an estoppel to the disaffirmance of it. Judgment affirmed. *Sheldon, J.*, in *Wieland v. Kobick*, 110 Ill. 16 (1884), citing *Merriam v. Cunningham*, 11 Cush. 40; *Studwell v. Shapter*, 54 N. Y. 249; *Gilson v. Spear*, 38 Vt. 311; *Burley v. Russell*, 10 N. H. 184; *Conrad v. Lane*, 26 Minn. 389; 4 N. W. Rep. 695; *Brown v. McCune*, 5 Sandf. 228.

§ 38. **Ancient Deeds.**—The rule is that an ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity freeing it from all just grounds of suspicion.¹

A deed from Craig to Michael Gratz, dated July 16, 1784, was offered in evidence, but was not proved by the subscribing witnesses, nor their absence accounted for. Its admission was alleged as error, but the court said that as the deed was more than thirty years old and was proved to have been in the possession of the lessors of the plaintiff, and actually asserted by them as the ground of their title in a prior chancery suit, it was in the language of the books, sufficiently accounted for; and on this ground, as well as because it was a part of the evidence in support of the decree in that suit, it was admissible without the regular proof of its execution. *Barr v. Gratz*, 17 U. S. (4 Wheat.) 220.

It was contended by the plaintiff in error that in no case could a paper be admitted in evidence as an ancient deed without proof of its execution, until it was first shown that thirty years' quiet and continued possession of the land had been held under the deed. But the court held, in substance, that an ancient deed may be introduced in evidence without proof of its execution, although possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine. *Caruthers v. Eldrige*, 12 Gratt. (Va.) 670.

The court of appeals of Kentucky states the rule in relation to the proof of ancient deeds, thus: "The genuineness of such instruments may be shown by other facts as well as that of possession. And when proof of possession can not be had, it is within the very essence of the rule to admit the instrument, when no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it. *Harlan v. Howard*, 79 Ky. 373; *Viner Abr.*, Evidence, A. b. 5; *Com. Dig.*, Evidence, B. 2; 1 *Greenl. Ev.* § 144, note 1; *Starkie's Ev.* 524; *Phillipps' Ev.*, Cowin & Hill's notes, Part'n 197, P. 368, Eq. Sec., 3d Ed.; *Doe v. Porcingham*, 12 Eng.

¹ *Applegate v. Lexington, etc., Co.*, 117 U. S. 255 (1885); *Barr v. Gratz*, 17 U. S. (4 Wheat.) 220.

C. L. 209; Sir T. Porkynswill, 6 Dow, 202; Winn v. Patterson, 9 Pct. (U. S.) 663; Jackson v. Laroway, 3 Johns. Cas. 283; Hewlet v. Cock, 7 Wend. (N. Y.) 371.

Judge Nelson of New York said that there was some confusion in the cases in England and New York, as to the preliminary proof necessary to authorize an ancient deed to be read in evidence; that possession accompanying the deed was always sufficient without other proof, but it was not indispensable. He approved the decision in *Jackson v. Laroway*, 3 Johns. Cas. 283, which he said had been recognized as law in *Jackson v. Luquere*, 5 Cowen, 221, and had undoubtedly in its favor the weight of English authority. *Hewlet v. Cock*, 7 Wend. (N. Y.) 371.

Another circumstance relied on to show the genuineness of the original deeds was that each bore indorsed thereon a certificate apparently ancient and genuine, one with the signature of the recording officer and the other without signature, to the effect that the deeds had been recorded in the year 1816. In the case of *Stebbins v. Duncan*, 108 U. S. 50 (Bk. 27 L. Ed. 648), it was held that a certified copy of a memorandum made at the foot of the record of a deed, "recorded June 23, 1818," and without signature, was competent and conclusive evidence that the deed had been recorded at the date mentioned.

In view, therefore, of the habit of recorders of deeds, which is universal and matter of common knowledge, to indorse upon the deeds themselves the fact and date of their registration, the certificates appearing on the deeds in question were competent and sufficient evidence of the fact that the deeds had been put upon record during the year mentioned in the certificates. *Applegate v. Lexington*, etc., 117 U. S. 255 (1885).

§ 39. **The General Rule.**—It is sometimes said that ancient instruments prove themselves, and it is an old and well settled rule of evidence that registered deeds which appear to be thirty years old, and which have been followed by a possession under them, may be given in evidence without any proof of their execution. After such a lapse of time the witnesses are presumed to be dead. And it is said to be a peremptory rule of law found to be both safe and convenient, that after a lapse of thirty years a deed unaccompanied by any circumstances of suspicion, may be admitted without any proof of its execution.¹ This rule has been adopted by direct adjudication, and has ever been recognized and practiced upon in our courts.²

¹ Morton, J., in *Green v. Chelsea*, (N. Y.) 169; *Doe v. Campbell*, 10 Johns. 41 Mass. 76 (1836); *King v. Merritt*, (N. Y.) 475.

67 Mich. 194; 34 N. W. Rep. 689 ² *Green v. Chelsea*, 41 Mass. 77 (1887); Co. Lit. 6 b; 1 Phil. Ev. (6th (1836); *Stockbridge v. West Stockbridge*, 14 Mass. 257; *Tolman v. Evid. F*; Bull. N. P. 255; *Jackson v. Emerson*, 4 Pick. (Mass.) 160; *King v. Blanshan*, 3 Johns. (N. Y.) 292; 1 Merritt. 67 Mich. 94; 34 N. W. Rep. Stark. Ev. 343; *Doe v. Phelps*, 9 Johns. 689 (1887).

Its utility and wisdom have recommended it to universal acceptance, and we find it recognized wherever we can trace it.¹

§ 40. **A Sheriff's Deed as an Ancient Deed.**—When the possession of premises has gone for more than twenty years along with a sheriff's deed it will be admitted without producing the record.²

§ 41. **Lost Title Papers.**—It is an elementary rule of law that evidence of the execution or contents of a deed can not be admitted without the production of the deed itself, unless it can be shown (1) that it is in the possession of the opposite party, and he refuses to produce it after notice; or (2) that it is lost or destroyed. The evidence of the loss of a deed is addressed to the court alone; it is not a subject on which the jury are to pass. The fact of its existence and its contents are matters to be tried by the jury. The loss of it is for the court and must be made out as a prerequisite to the satisfaction of the court. The law exacts nothing unreasonable in such a case. If the proof establishes the fact with reasonable certainty that is sufficient. No precise rule can be safely laid down upon this subject further than that diligent search should be made in all places where such papers are usually kept, and inquiry of those persons in whose custody the law presumes the deed to be, supposing it once to have existed.³

§ 42. **What Evidence is Required of the Loss of a Deed—The Rule Stated by Greenleaf.**—If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof; after

¹ Green v. Chelsea, 41 Mass. 77 (1836); Joce's Lessee v. Harris, 1 Har. & M'Hen. 196; Hoddy v. Harriman, 3 Har. & M'Hen. 581; Carroll v. Norwood, 1 Har. & Johns. 174; Thompson v. Bullock, 1 Bay, 364; Middleton v. Mass. 2 Nott. & McCord, 55; Roberts v. Stanton, 2 Munf. 129; Lee v. Tapscott, 2 Wash. 276; Shaller v. Brand, 6 Binney, 435; Mallory v. Aspinwall, 2 Day, 280; King v. Merritt, 67 Mich. 194; 34 N. W. Rep. 689 (1887).
² Burke's Lessee v. Ryan, 1 Dall. (U. S.) 94 (1784).
³ Jackson v. Frier, 16 Johns. (N. Y.) 193 (1819); Jackson v. Seeley, 10 Johns. (N. Y.) 374.

which his own affidavit is admissible to the fact of its loss. The same rule prevails where the instrument is destroyed. What degree of diligence in the search is necessary, it is not easy to define, as each case depends much upon its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court and not by the jury. But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. It should be recollected that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and that that is a preliminary inquiry addressed to the discretion of the judge. If the paper was supposed to be of little value, or is ancient, a less degree of diligence will be demanded, as it will be aided by the presumption of loss which these circumstances afford. If it belonged to the custody of certain persons, or is proved or may be presumed to have been in their possession, they must, in general, be called and sworn to account for it, if they are within reach of the process of the court, and so, if it might or ought to have been deposited in a public office, or other particular place, that place must be searched. If the search was made by a third person, he must be called to testify respecting it, and if the paper belongs to his custody, he must be served with a *subpoena duces tecum* to produce it.¹

§ 43. **Danger in Allowing the Introduction of Copies.**—There is much danger in allowing the introduction of copies of deeds conveying valuable lands, without fully establishing the fact of the existence at some time of an original, and of its subsequent loss or destruction, so that after diligent search it could not be found. How easy it is to get a forged deed upon the record, and then in the absence of evidence of the existence, at any time, of an authentic original, with a general allegation of its loss, show the record and recover the property. Justice and the safety of the people require a rigid rule to be applied and enforced in such cases.²

¹ 1 Greenl. Ev. § 558; *Mariner v. Breese*, J., in *Dickinson v. Bruden, Saunders*, 5 Gil. (Ill.) 113; *Pardee v. Lindley*, 31 Ill. 187 (1860).
² *Lindley*, 31 Ill. 176 (1863).

§ 44. Affidavit as a Foundation of the Introduction of Copies of Lost Deeds.

STATE OF _____, }
County of _____, } ss. In the _____ Court, _____ Term, 18—.

“A _____ G _____, being duly sworn, deposes and says, that he was the owner and holder of a certain deed of trust, made on the first day of April, 1858, by W _____ L _____, of _____ county, _____, to this affiant, as trustee, and in trust for certain purposes therein expressed, wherein the said L _____ conveyed to this affiant the following real estate, to wit:” (setting out the lands as in the copy offered in evidence); “that said deed of trust was in the possession of this affiant on or about the 20th day of November, A. D. 1861, and about the time this affiant advertised said land under said trust deed; that since that time he has lost or mislaid said trust deed or the same has been abstracted; that since the loss of said deed this affiant has carefully and diligently searched all places where he keeps his papers of that kind; that he has carefully searched all places in his dwelling-house, in his private apartments, in the bank, and the entire vault, and all other places in the bank where he kept, or where any person or persons kept, papers of any description; that the last he knew of said deed it was in the possession of this affiant.

“This affiant further swears, that he has made careful and diligent personal search in all places where he, or any person connected with him doing business, keep or have kept their papers since the disappearance of said deed, so that for these reasons this affiant says he has lost the said deed, and that the said deed can not now be produced; nor is it in the power of this affiant to produce this said deed.”

“Subscribed and sworn to before me,” etc.

§ 45. Secondary Evidence—Contents of Lost Instruments—Discussion of the Subject.—From the nature of the subject there is some difficulty in laying down a general rule defining the extent of the search a party must make before the court may conclude that the paper is lost or destroyed, so as to admit secondary evidence of its contents. As a general rule, however, we may say, that when from the ownership, nature or

¹ Pardee v. Lindley, 31 Ill. 176 (1863).

object of a paper, it has properly a particular place of deposit, or where, from the evidence, it is shown to have been in a particular place, or in particular hands, then that place must be searched by the witness proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend in a great degree upon the circumstances. Ordinarily it is not sufficient that the paper is not found in its usual place of deposit, but all the papers in the office or place should be examined, etc. On the whole, the court must be satisfied that the paper is destroyed and can not be found. It is true the party need not search every possible place where it might be found, for then the search might be interminable; but he must search every place where there is a reasonable probability that it may be found.

This rule is founded in reason and justice, and to require of the party a less degree of diligence, would defeat the object of reducing contracts to writing, and the object of the legislature in requiring conveyances to be by deed. It would leave the tenure to real estate dependent on the frail memory and imperfect understanding of witnesses, who would in many instances be illiterate and ignorant of the legal effect of contracts. The party wishing to avail himself of such secondary evidence, should be required to make at least the same effort that is expected the party would make if he were to lose the benefit of the evidence if the instrument were not found.¹

§ 46. **The Rule as to the Grantee and Other Parties.**—When the party relying upon a deed of conveyance is the grantee, or person who is entitled to the possession of it, he must produce the original, or lay a foundation, in the usual manner, for the introduction of secondary evidence. But where any other person has occasion to introduce deeds in support of his title, he has a right to use office copies, and of course is excused from proof of their execution.²

In England, where the muniments of title usually pass with the land, the practice may be different, and where the law of

¹ Walker, J., in *Rankin v. Crow*, 19 Mass. 187 (1834); *Eaton v. Campbell*, Ill. 629 (1858); *Mariner v. Saunders*, 5 7 Pick. (Mass.) 12; *Scanlan v. Wright*, Gil. (Ill.) 113. 13 Pick. (Mass.) 523.

² Morton, J., in *Ward v. Fuller*, 32

primogeniture prevails and the partition and alienation of estates are infrequent and discouraged by the policy of the government, it may be expedient and wise to require all who claim under deeds, whether directly or remotely, to produce and prove the originals; but in this country, where the evidence of title is retained by the grantor and passes into the hands of his executors or administrators, and where it is the policy of the government to provide all reasonable facilities for the distribution and transfer of estates, such a rule would be inconvenient and impolitic.¹

§ 47. **Alterations in Deeds, etc.**—If the instrument, when produced, appears to have been altered, or there are any grounds of suspicion apparent upon its face, the party producing it must explain its appearance. But the general rule is that if nothing appears to the contrary, the alteration will be presumed to have been made at the time the deed was executed.²

§ 48. **Effect of a Deed—A Question for the Court.**—The effect of a deed is a question of law for the court, but whether there is an instrument purporting to be a deed conveying a particular tract of land, is a question of fact for the jury.³

§ 49. **Government Patents as Muniments of Title.**—The instrument which forms the evidence to lands acquired from the government, is called a patent. It is signed by the President, or some one appointed to annex his signature, with the seal of the United States, and where regularly issued, becomes a complete evidence of title.⁴

§ 50. **A Patent has a Double Operation.**—In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey; but when it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as

¹ Morton, J., in *Ward v. Fuller*, 32 Mass. 187 (1833).

³ *Strean v. Lloyd*, 128 Ill. 493 (1889).

² *Bailey v. Taylor*, 11 Conn. 531; *Gooch v. Bryant*, 1 Shepley, 386, 390; *Crabtree v. Clark*, 7 Ib. 337; *Pullen v. Hutchinson*, 12 Ib. 249, 254; *Doe v. Catsmore*, 15 Jur. 728; 5 Eng. Law & Eq. 349.

⁴ *Washburn on Real Property*, 167; *Owens v. Jackson*, 9 Calif. 322; *The People v. Livingston*, 8 Barb. (N. Y.) 253; *Doe v. McKilrain*, 14 Ga. 252; *Hulick v. Scovel*, 4 Gil. (Ill.) 174.

evidence of previously existing rights because it also embodies words of release or transfer from the government.¹

§ 51. **Public Lands—First Location—Subsequent Grants.**

—The rule is well settled by a long course of decisions that when public lands have been surveyed and placed in the market or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated or set aside.²

§ 52. **Priority of Patents—Evidence of Title.**—It is the almost universal rule of our courts to look to the elder patent in all question of titles, and to give it effect it is not for the court to look to any equitable claim on the general government which a third party might have in respect to lands conveyed to another person prior to the issuing of the patent.

The elder patent must be impeached and vacated before any title can be set up under the younger one, and it can not be impeached by parol proof. Letters patent are matter of record; they can alone be avoided in chancery by a writ of *scire facias* sued out on the part of the government or some one prosecuting in its name, or by a bill in chancery. The settled English practice is so, and we have no law or practice prescribing a different course. By an examination it will be found that the authorities, both English and American, speak of the case of two successive patents for the same thing, and that the second patent is void, though some differ as to which shall pursue the remedy to vacate either. The better construction, however, and one more consonant to the nature of the case, seems to be, that the *scire*

¹Wright v. Roseberry, 121 U. S. 488. ination, they will be found to be distinguished by the fact that something remained to be done by the

²Bradley, J., in Wirth v. Branson. 28 U. S. (8 Otto) 118 (1878); Fowler v. Scott, 64 Wis. 509; 25 N. W. Rep. 716 (1885); Lytle v. Arkansas, 9 How. (U. S.) 314; Stark v. Stars, 73 U. S. (6 Wall.) 187; Yosemite Valley Case, 82 U. S. (15 Wall.) 77; R. Co. v. McShane, 89 U. S. (22 Wall.) 444; Shepley v. Cowan, 91 U. S. 380. thing remained to be done by the claimant to entitle him to a patent; see Stark v. Stars, 73 U. S. (6 Wall.) 187; Frisby v. Whitney, 76 U. S. (9 Wall.) 402; there are some cases which seem to conflict with the doctrine laid down in the text but upon exam-

facias should be prosecuted by the second guarantee, to avoid the first, it being a matter of record, or that he pursue his remedy by bill in chancery.¹

§ 53. **The United States Patent Must Prevail.**—In the action of ejectment in the State courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States the patent must prevail. "For Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government in reference to the public lands, declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the Government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."²

§ 54. **Void Patents, etc.**—But if a patent is absolutely void upon its face or the issuing thereof was without authority by statute, or the State had no title, it may be impeached collaterally in a court of law in an action of ejectment, and this rule is as applicable to a grant by a territory as to one made by a State. Grants made by legislatures are not warranties, and if the thing granted was not in the grantor no estate passes to the grantee.³

§ 55. **Void Grants.**—"There are cases," said Chief Justice Marshall, "in which a grant is absolutely void, as when the State has no title to the thing granted, or when the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law."⁴ Indeed, it may be said to be common knowledge that patents of the United States for lands which they had previously granted, reserved for sale, or appropriated, are void.⁵ It would be a most extraordinary doctrine if the holder of a conveyance of land from a State were precluded from establishing his title simply because the United States may have subsequently con-

¹ *Jackson ex dem. Mancius v. Lawton*, 10 Johns. (N. Y.) 23; *Bruner v. Manlove*, 1 Scam. (Ill.) 156 (1834); *Polk's Lessee v. Wendell*, 13 U. S. 488.

Jackson v. Hart, 12 Johns. (N. Y.) 77. ⁵ *Eveton v. Salisbury*, 63 U. S. (21 How.) 426; *Richard v. Phelps*, 73 U. S. 160; *Best v. Polk*, 85 U. S. 112; *Wright v. Roseberry*, 121 U. S. 488.

³ *Rice v. Minn., etc., R. R. Co.*, 66 U. S. (1 Black.) 358 (1861); *Patterson v. Winn*, 11 Wheat. (U. S.) 388.

veyed the land to another, and especially from showing that years before they had granted the property to the State, and thus were without title at the time of their subsequent conveyance.

As the court said in *New Orleans v. The United States*, "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive and can not be controverted; but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative."¹

§ 56. When the Issue and Delivery of a Patent are Ministerial Acts.—It is well settled that when lands have once been sold by the United States and the purchase money paid, the lands sold are segregated from the public domain and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty.²

§ 57. A Sovereign Grant Can Not be Inquired Into, When.—When a grant or patent for land, or legislative confirmation of titles to land, has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent or by the law to inquire into its fairness as between the grantor and grantee, or between third parties, a third party can not raise, in ejectment, the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant. It is a question exclusively between the sovereignty making the grant and the grantee. So a patent can not be avoided collaterally for fraud.³

§ 58. The Question Discussed by Mr. Justice Wayne.—

¹ *New Orleans v. U. S.*, 10 Pet. (U. S.) 663; *Wright v. Roseberry*, 121 U. S. 488. ² *Whitney*, 76 U. S. (9 Wall.) 187; *Lyttle v. Arkansas*, 9 How. (U. S.) 314. ³ *Field v. Seaberry*, 60 U. S. (11 Otto) 260 (1879); *Wirth v. Branson*, 101 U. S. 323 (1879).

² *Simmons v. Wagner*, 101 U. S. 323 (1879). ³ *Field v. Seaberry*, 60 U. S. (11 Otto) 260 (1879); *Wirth v. Branson*, 101 U. S. 323 (1879).

"We are not aware that such a proceeding is permitted in any of the courts of law. In England a bill in equity lies to set aside letters patent obtained from the King by fraud (*Atty.-Gen. v. Vernon*, 1 Vern. 277, 370; the same case, 2 Ch. Rep. 553), and it would be in the United States; it is a question exclusively between the sovereignty making the grant and the grantee. But in neither could a patent be collaterally avoided at law for fraud. This court has never declared it could be done. *Stoddard v. Chambers*, 2 How. 284, does not do so, as has been supposed. In that case an act of Congress confirming titles, excepted cases where the land had previously been located by any other person than the confirmee under any law of the United States, or had been surveyed and sold by the United States; and this court held that a location made on land reserved from sale by an act of Congress, or a patent obtained for land so reserved, was not within the exception, and the title of the confirmee was made perfect by the act of confirmation, and without any patent, as against the prior patent, which was simply void, and this valid legal title inured at once to the benefit of an assignee of the confirmee. In this connection it must be remembered that we are speaking of patents for land, and not of transactions between individuals, in which it has been incidentally said, by this court, that deeds fraudulently obtained may be collaterally avoided at law."¹

§ 59. **Powers of the Secretary of the Interior.**—It is the duty of the land department of which the secretary of the interior is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws; and his judgment as to this fact is not open to contestation, in an action at law, by a mere intruder without title.

It would be a departure from sound principle and contrary to well considered judgments of the courts to permit the validity of the patent to be subjected to the test of the verdict of a jury on oral testimony.

It would be substituting the jury or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United

¹*Swayne, J., in Field v. Seaberry, v. Sayre*, 8 Pet. (U. S.) 244; *Swayze* 60 U. S. (19 How.) 323 (1850); *Gregg v. Burke*, 12 Pet. (U. S.) 11.

States a cheap and unstable reliance for title of lands which it purported to convey.¹

§ 60. **Decision of the U. S. Land Department Conclusive as to Priority of Pre-emption Claims.**—The land department of the United States is a tribunal appointed by Congress to decide the question whether a person has filed a prior pre-emption claim, and its decision thereon is conclusive everywhere else as regards all questions of fact. Where fraud or imposition has been practiced on the party interested or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief, but they are not authorized to re-examine into a mere question of fact depending on conflicting evidence and to review the weight which those officers attach to such evidence.²

§ 61. **Impeachment of Patents.**—A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.³

§ 62. **Wills and Testaments as Muniments of Title—The Power of Testamentary Disposition of Real Property.**—The right of testamentary disposition of property is unquestionably one of the results of cultivated social life and dependent upon municipal law. But it is, nevertheless, an instinctive sentiment intimately associated with that law of acquisition and of dominion which forms the basis and the stimulus of all social progress, and which in its normal development is the sure measure of advancing civilization, and its morbid ex-

¹Ehrhardt v. Hogaboom, 115 U. Chouteau, 80 U. S. (13 Wall.) 102; S. 57. Marquez v. Frisbie, 101 U. S. 475;

²Baldwin v. Storks, 107 U. S. (17 Shepley v. Cowan, 91 U. S. 330. Otto) 463 (1882); Johnson v. Tousley, ³Wright v. Roseberry, 121 U. S. 80 U. S. (13 Wall.) 86; Gibson v. 488 (1836).

cesses equally mark the process of declension and the increase of crime.¹

Seven rules applicable to wills which may be regarded as of universal application.

I. No will is of any effect until the death of the testator; until then it may be altered by codicil or revoked altogether by the testator, and if there is more than one will the last *nam omne testamentum morte consummatum est, et voluntas testatoris est ambulatoria usque ad mortem*. This, Lord Loborough observed, was the most general maxim he knew. *Matthews v. Warner*, 4 Ves. 210. In fact, it is essential to every testamentary instrument, that it may be altered even *in articulo mortis*; irrevocability would destroy its essence as a last will. *Balch v. Symes*, 1 Turn. & R. 92; *Hobson v. Blackburn*, 1 Add. 278; *Reid v. Shergold*, 10 Ves. 399.

II. If a will be once duly executed, and once an existing will in the hands of the testator, unless there be evidence of its having been canceled or otherwise revoked by the testator, the law presumes its continued existence to the time of his death. *Johnson v. Johnson*, 1 Phill. 466; *Jackson v. Betts*, 9 Cow. (N. Y.) 208; *Irish v. Smith*, 8 Serg. & R. Pa. 578.

III. Only one signature of the testator is required, though the will may be written upon more than one sheet of paper; and if the *testimonium* clause refers to the preceding sheets as severally signed with the name, whereas he has signed at the end only, this will suffice if it appears to have been in fact intended to apply to the whole. It is not essential to the validity of the will, that the different parts of it should be physically connected. It is sufficient if they are connected by their internal sense, or by a coherence and adaptation of facts. When the will is found written on several sheets of paper, and the last only is signed and attested, the presumption is that all of the sheets belong to the will. *Winsor v. Pratt*, 5 J. B. Moore 484; 2 Brod. & B. 650; *Marsh v. Marsh*, 6 Jur. N. S. 380; *Wykoff's Appeal*, 12 Penn. 281.

IV. The will must be attested by competent witnesses, that is, by persons who are not rendered incompetent to give testimony by reason of insanity, mental imbecility, or other legal cause. The statutes of some of the States define the qualification of the witnesses; but the rule is universal that they must be competent to give testimony at the time they subscribe their names as witnesses to the will.

VI. The testator must be qualified in respect to age, mental capacity and freedom from legal disability to make a will; and when his will is attested he must have mental knowledge and consciousness of the fact. Should he be in a state of insensibility at the moment of attestation, his will would be void. *Shires v. Glascock*, 5 Salk. R. 688; *Casson v. Dade*, 1 Brown Ch. 99; *Doe v. Manifold*, 1 Maule & S. 294; *Tod v. Earl Winchelsea*, 1 Moore & M. 12; *Hill v. Barge*, 12 Ala. 687; *Right v. Price*, Doug. (Mich.) 241.

VI. The rule that the will may be signed by the testator with his own hand, or, if he is not able to write his name, he may make his mark, is general, and not limited to any country or State; and, as in the case of the testator, so also a mark made by a witness to the will as his signature is a sufficient attestation. 2 Greenl. Ev., § 677; *Redfield on Wills*, 229, 230, 231; *Nickerson v. Bush*, 12 Cush. (Mass.) 332.

¹ 1 Redfield on Wills, 1-4; 2 Black. Com. 488-492; 4 Kent Com. 501-504.

VII. The subscribing witnesses may testify as to their opinions in respect to the sanity of the testator at the time of the execution of the will, though other witnesses can speak only as to facts. *DeWitt v. Barley*, 9 N. Y. 371; *Grant v. Thompson*, 4 Conn. 203; *Bambler v. Tryon*, 7 Serg. & R. (Pa.) 90; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329.

§ 63. **The Essentials of a Will or Testament.**—The term will or testament is defined by the lexicographers to be the legal declaration of a man's intentions of what he wills to be performed after his death.¹ The terms will and testament are synonymous and are used indifferently by writers one for the other.

There are five essential requisites to make a good will, namely:

- (1) The testator must be legally capable of making a will.
- (2) It must be made with *animum testandi*, that is, with an intention to make a will.
- (3) The mind of the testator must be free to act and not moved by fear, fraud or flattery.
- (4) There must be persons capable of taking as legatees or devisees named in the will.
- (5) It must be in proper form and to vest the title of real estate it must be in writing.

§ 64. **Incapacity of the Testator.**—The persons capable of executing wills are best defined by stating the exceptions of such as labor under incapacity, all others being competent.²

§ 65. **Aliens.**—Aliens, who, by the English common law, which has been adopted in most of the States, are incompetent to devise real estate, form one class.

The rule of the English law stated by Sugden: "Aliens are incapable of holding real estate, for although they may purchase, it can only be for the benefit of the King, and upon office found the King shall have it by his prerogative."³

The rule in America seems to be that an alien may take land by devise and hold it against all the world except the State and against the State, until his title is divested by proper legislative or judicial proceedings.*

§ 66. **The Laws Stated by Redfield.**—This matter of the

¹ Bacon's Abr., title Wills; Coke on Littleton, 111; 2 Bouvier's Law Dic. 652. ⁴Craig v. Leslie, 3 Wheat. (U. S.) 563; Doe v. Robertson, 11 Wheat. (U. S.) 332; Jackson v. Beach, 1 Johns. Cas. (N. Y.) 499; Dudley v. Grayson, 6 Mon. (Ky.) 260.

² 1 Redfield on Wills, 8.

³ Sugden on Vendors and Purchasers, Ch. 20, § 11.

right of aliens to hold lands in the several States, although a question affecting national allegiance, which is under the exclusive jurisdiction of the national government, seems to have been regarded as a matter wholly within the control of the State legislature. Hence, at a very early day, it was not uncommon for special statutes to be passed in the different States, allowing aliens to hold lands. And there can be no question as to the entire validity of such laws, and that the several States may allow resident aliens to hold lands within the State upon such terms as they see fit to prescribe. And there is no question, we apprehend, that the several States may, by general laws, allow all resident aliens to hold and convey land within their limits, upon such terms as they deem proper, without naturalization. The general policy of this country in placing no limits or restrictions upon free access, ingress and immigration into all parts of our widely extended country seems not to favor any needless restrictions on the transmission of estates even by aliens."¹

§ 67. **Infancy.**—The age at which persons are allowed to dispose of their property by will is now determined by statutory enactments both in England and the United States.² As an example we quote the statutes of Iowa and Illinois:

(1) IOWA.

Any person of full age and sound mind may dispose, by will, of all his property except what is sufficient to pay his debts, or what is allowed as a homestead, or otherwise given by law as privileged property to his wife and family.³

(2) ILLINOIS.

Every male person of the age of twenty-one years, and every female of the age of eighteen years, being of sound mind and memory, shall have power to devise all the estate, right, title and interest, in possession, reversion or remainder, which he or she hath, or at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities or rents, charged upon or issuing out of them, or goods and chattels, and personal estate of every description whatsoever, by will or testament.⁴

§ 68. **Coverture.**—In some of the American States coverture still interposes a disability in regard to the execution of a will. But the tendency of modern times has been in the direction of removing all property disabilities attaching to married women. In order to solve the question of the right of married women

¹ Redfield on Wills, 14.

⁴ R. S. Ill. 1845, 536, § 1; R. S. 1883,

² Redfield on Wills, 15.

1174, § 1.

³ R. S. Iowa 1860, 407.

to transfer real property by will reference must be had to the statutes of those States in which it arises. By the Roman civil law a married woman possessed the same testamentary capacity in all respects as when unmarried, but by the law of England no such favor has ever been conceded.¹

§ 69. **Mental Incapacity.**—A want of testamentary capacity in the testator renders the will void. Generally all persons who can make valid contracts can dispose of their property by will. This act requires a power of the mind freely to dispose of property. Infants, because of their want of mature judgment and experience, and married women in some States because of the supposed influence and control of their husbands, have no power or legal capacity to make wills, but the term incapacity as used in this connection is mental incapacity, and applies to persons devoid of understanding, *idiots, lunatics, persons non compos mentis*, the weak and feeble-minded.²

§ 70. **The Terms Unsound Mind and Non Compos Mentis Considered.**—The term “unsound mind” in our law is used as synonymous with “*non compos mentis*,” which comprehended all defects of the mind of which the law takes notice. This, it was said, was of four kinds, as defined by Lord Coke and approved by Blackstone: “1. *Idiota*, which from his nativity by a perpetual infirmity is *non compos mentis*. 2. He that by sickness, grief or other accident, wholly loses his memory and understanding. 3. A lunatic, that has sometimes his understanding and sometimes not, and, therefore, he is called *non compos mentis* so long as he has not understanding. 4. Lastly, he that for a time depriveth himself, by his own vicious act, of his memory and understanding, as he that is drunken.”³

§ 71. **Discussion of the Subject.**—It can not be said that because a testator had not wholly lost his memory and understanding, he was, from mere weakness of mind, in contemplation of law, of unsound mind, and for that reason within the exception of the statutes. The law makes no such distinction.

¹ 1 Williams on Ex'rs, 47; 2 Black. § 222; Bacon's Abridgment, Wills, C. Com. 497; 1 Redfield on Wills, 22. Coynyn's Digest, Estates by Devise, D.

² Beverly's Case, 4 Coke R. 123; 1 Swinburne, Part II, Sec. 2.
1 Redfield on Wills, 59, 60, 61 *et seq.*; ³ 1 Coke's Inst. 246; 1 Black. Com. Fitzherbert N. B. 532; Taylor's Med. 304.

Jur. 633; Wharton & Stille Med. Jur.

There is no grade of understanding between the highest and the lowest, which incapacitates a testator, when there is no fraud or imposition. In the language of Senator Verplanck,¹ "To establish any standard of intellect or information beyond the possession of reason in its lowest degree, as in itself essential to legal capacity, would create endless uncertainty, difficulty and litigation, would shake the security of property and wrest from the aged and infirm that authority over their earnings or savings which is often their best security against injury and neglect. If you throw aside the old common law test of capacity, then proofs of wild speculations, or extravagant or peculiar opinions, or of the forgetfulness, or the prejudices of old age, might be sufficient to shake the fairest conveyance, or impeach the most equitable will. The law, therefore, in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, and therefore wise and safe.

"It holds, in the language of an English writer on this subject, that 'weak minds differ from strong ones only in the extent and power of their faculties; but unless they betray a total loss of understanding, or idiocy, or delusion, they can not properly be considered unsound.'"²

Where unsoundness of mind is alleged as a ground for defeating a devise of real estate, the fact of insanity, or of unsoundness of mind, must be established with reasonable certainty; the evidence of insanity should preponderate, or the will must be taken as valid. If there is only a bare balance of evidence, or a mere doubt only, of the sanity of the testator, the presumption in favor of sanity must prevail and turn the scale in favor of the sanity of the testator. Jarman on Wills, 5 Am. Ed., 104; Red. on Wills, 31-50; Perkins v. Perkins, 39 N. H. 163; Brooks v. Barrett, 7 Pick. (Mass.) 94; Turner v. Cook, 36 Ind. 129; Dickie v. Carter, 42 Ill. 376; Terry v. Bufington, 11 Ga. 337; In re Coffman, 12 Ia. 491; Cotton v. Ulmer, 45 Ala. 378.

Application of the law.

M. Gill, at the time of his death, February 10, 1841, was seized of certain premises in Albany, New York, which, by his last will and testament, executed four days before his death, he devised to his daughter, Caroline Nestle, in fee. The children of Elizabeth Blanchard, also a daughter, whom he survived, brought an action of ejectment against the husband of Caroline Nestle,³ to recover the premises as heirs at law of the testator. The only

¹ In Stewart, v. Lisenard, 26 Wend. (N. Y.) 255 (1846).

³ Under the practice then existing it seems to have been necessary to

² Blanchard v. Nestle, 3 Denio (N. Y.), 37; Shelford on Lunacy, 39 Am. Ed. 1833.

question in the case related to the validity of the will, which was attacked by the plaintiffs on the ground that the testator was not of sound mind: or that if he was it was procured by undue influence exerted over him by his daughter, Mrs. Nestle, and her husband, the defendant. The subscribing witnesses testified that the testator was of sound mind when the will was executed, and there was other testimony to the same effect. On the other hand, several witnesses were examined on behalf of the plaintiffs, whose testimony tended to prove that the testator was then unable to transact business by reason of weakness both of body and mind; and it was shown that at about that time the defendant had written a letter representing that the testator was in a state of great physical debility, and in effect that he had become imbecile in mind. It appeared that the will was in part written by Mrs. Nestle from the dictation of the testator, and executed in her presence, and there were other circumstances connected with its execution which the plaintiffs claimed afforded evidence that an improper influence had been exerted over his mind by Mrs. Nestle. The property devised to her was of greater value than that given to the plaintiffs by about \$5,000. On the trial, the judge charged the jury that "Imbecility of mind in a testator will not avoid his last will and testament. Idiots, lunatics, and persons *non compos mentis* are disabled from disposing of their property by will, but every person not embraced within either of the above classes, of lawful age, is competent to make a will, be his understanding ever so weak. Courts in passing upon the validity of a will do not measure the extent of the understanding of the testator; if he be not wholly deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions." The judge further remarked that he understood the doctrine established to be that mere imbecility of mind, however great, will not avoid the will of a testator.¹ If he be not totally deprived of understanding, his right remains perfect to dispose of his property by will. The plaintiff's counsel excepted. He also charged, on the subject of undue influence, that if the testator had been induced to make the provisions in the last will by the undue influence of the defendant or his wife, the will was void; but it was for the jury to determine from the evidence whether there was any undue influence exercised over the mind of the testator at the time he executed his will. The jury found a verdict for the defendant. The plaintiffs move for a new trial on a case. In refusing the new trial Jewett, J., said: "I have examined the evidence, I think carefully, and am free to say that in my opinion it falls far short of establishing the fact of any improper influence having been exercised over the testator in the making of his will. There is not the slightest proof that I can discover, to show any artifice or fraud having been practiced or attempted,

¹In his charge to the jury the judge announced the doctrine laid down in *Stewart v. Lispenard*, 26 Wend. 255. The doctrines of that case as stated by the trial judge are not fully sustained by the later New York authorities. See *Delafield v. Parish*, 25 N. Y. 9; *Caw v. Snyder*, 46 Barb. 230; *Alstan*

v. Jones, 10 Paige, 98. The expression, "mere imbecility of mind, however great," seems to be carrying the doctrine too far, as the greatest degree of imbecility of mind must be complete imbecility, which is only another name for a total loss of understanding.

by any person upon the testator in regard to it. It is true that the defendant's wife wrote a part of the will; but if there is any reliance on human testimony, it is equally true that in that she only obeyed, with reluctance, the commands, or complied with the urgent request of her father. It is said that she dictated the will. If by that is meant that she reminded her father of what he said, as she stated, before told her in relation to certain of his property, it is true. But does that amount to the exercise of undue influence? Influence—persuasion—may be fairly used. A person has a right by fair argument or persuasion to induce another to make a will, and even to make it in his own favor. The procuring a will to be made by such means is nothing against its validity. *Blanchard v. Nestle*, 3 Denio (N. Y.), 37; citing *Miller v. Miller*, 3 Serg. & R. 267.

§ 72. **Power to Transfer Real Estate by Wills.**—The power to make a will is usually regulated by statute. As an illustration we quote a statute of New York:

All persons except idiots, persons of unsound mind, married women¹ and infants, may devise their real estate by their last will and testament duly executed.²

Under this statute the Supreme Court of New York hold that mere imbecility of mind in a testator will not avoid his last will and testament. Idiots, lunatics and persons *non compos mentis* are disabled from disposing of their real property by will, but any person not embraced within either of the above classes, of lawful age, etc., is competent to make a will, be his understanding ever so weak, if he be not wholly deprived of reason.³

§ 73. **Ratification**—(1) *Infants*.—The English text writers lay down the rule without hesitation or qualification, that the ratification of a will after the testator arrives at the age re-

¹ The statute has been changed as to married women.

² R. S. N. Y. 1836, 56, Sec. 1; *Blanchard v. Nestle*, 3 Denio (N. Y.), 37.

³ *Stewart v. Lisenard*, 26 Wend. (N. Y.) 255; see also *Legg v. Meyer*, 5 Redf. (N. Y.) 628; *Townsend v. Bogarte*, 5 Redf. (N. Y.) 93; approving *Bundy v. McKnight*, 48 Ind. 502; *Merrill v. Rolston*, 5 Redf. 220; *Phillips v. Chater*, 1 Dem. 533; *Leslie v. Leslie*, 15 Weekly Dig. 56; 92 N. Y. 636; *Wood v. Bishop*, 1 Dem. 512; *La Barr v. Vanderbuilt*, 3 Redf. (N.

Y.) 384; *Wade v. Holbrook*, 2 Redf. (N. Y.) 378; *Horn v. Pullman*, 72 N. Y. 269; *Children's Aid Society v. Loveridge*, 70 N. Y. 387; *Foreman v. Smith*, 7 Lans. (N. Y.) 443; see 54 Barb. (N. Y.) 274; *Kinne v. Johnson*, 60 Barb. (N. Y.) 69; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Johnson's Estate*, 57 Calif. 529; *Collins v. Osborn*, 34 N. J. Eq. 511; *Barnhardt v. Smith*, 86 N. C. 473; *Crubbs v. McDonald*, 91 Pa. St. 236; *Re Lewis*, 33 N. J. Eq. 219; *Brown v. Ward*, 53 Md. 376; *Brown v. Riggins*, 94 Ill. 560; *Hubbard v. Hubbard*, 7 Or. 42.

quired to execute a valid will, although executed before that age, renders it a valid instrument.¹

(2) *Other persons under legal disabilities.*—It is very questionable how far a will, executed while the testator is under legal disability, can be regarded as a valid instrument, from the mere fact of its subsequent parol ratification by the testator, after the removal of such disability. It would seem upon principle that the republication, according to the requirements of the existing statutes, would be necessary.²

§ 74. **The Rule Stated by Redfield.**—We think it safe to lay down the rule that where a will is required to be in writing and executed before witnesses, in order to its validity, and is thus executed before the testator arrives at the required age, it can not be rendered valid, after the testator arrives at full age, except by republication with all the prescribed formalities.³

§ 75. **Drunkenness.**—It seems now to be conceded that intoxication, to the extent of producing mental oblivion, while that state continues, deprives the party of the ability to enter into contracts or to execute a valid will and testament.⁴

The law stated by Swinburne.

“He that is overcome with drink, during the time of his drunkenness is compared to a madman, and therefore if he make his testament at that time it is void in law. Which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of reason and understanding. Otherwise, if he be not clean spent, albeit his understanding is obscured and his memory troubled, yet he may make his testament, being in that case.”

§ 76. **Senile Incapacity.**—Extreme old age always raises a doubt as to testamentary capacity, but no just inference can be drawn from the age of the testator alone. It has been said that “If a man in his old age becomes a very child again in his understanding, and is become so forgetful that he knows not his own name, he is then no more fit to make his testament

¹ 1 Redfield on Wills, 18; 1 Williams on Ex'rs, 16; 7 Bac. Abr., Wills B, 300.

² 1 Redfield on Wills, 19.

³ 1 Redfield on Wills, 19.

⁴ 1 Redfield on Wills, 160.

⁵ Swinburne on Wills, Part II, Sec. 6; Agrey v. Hill, 2 Add. 206; Billinghurst v. Vickers, 1 Philline, 191; Wheeler v. Alderson, 3 Hagg. Ecc. 602.

than a natural fool or a child or lunatic.¹” It is one of the painful consequences of extreme old age that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has to command the attention due to his infirmities. The will of such a man ought to be regarded with great tenderness where it appears not to have been procured by fraudulent arts, especially where it contains the dispositions of his property which the circumstances of his situation in life and his natural affections would seem to dictate.²

§ 77. **Undue Influence, Fraud, etc.**—Fraud and undue influence are so nearly synonymous terms that it will not be necessary to enter into the discussion of the distinction between them since the result of either must be the same upon the testamentary act.³ No general rule can be laid down as to what constitutes undue influence, further than that in order to make a good will a person must be a free agent, and feel at liberty to carry out his own wishes and desires; and any restraint, threats or intimidations brought to bear upon him, which he has not the strength of mind or will to resist, if exerted so as to coerce him against his desire and purpose into the making of a will, or any of its provisions, is undue influence within the meaning of the law, and renders the will or the provisions so affected, void; but, of course, to avoid a will on the ground of undue influence, it must be made to appear, by the evidence, that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will, and which influence he was unable to withstand, or too weak to resist.*

§ 78. **Its Form and Execution.**—By the English statute of frauds which has been substantially adopted in all the American

¹ Williams on Ex'rs, 36; Griffiths Cold. (Tenn.) 130; Hathorn v. King, 8 v. Robins, 3 Madd. 191; Potts v. Mass. 371.

House, 6 Ga. 324; Redf. Am. Cases ² 1 Redfield on Wills, 510; Davis v. on Wills, 262; Redfield on Wills, 98; Calvert, 5 Gill & J. (Md.) 269; Dietrick v. Dietrick, 5 Serg. & R. (Pa.) 207. Mackenzie v. Handasyde, 2 Hagg. Ecc. 211; Van Alst v. Hunter, 5 ⁴ Brick v. Brick, 66 N. Y. 144; Johns. Ch. (N. Y.) 148. Barnes v. Barnes, 66 Me. 285; Brad-

³ Maverick v. Reynolds, 2 Brad. Sur. ford v. Vintor, (Mich.); 26 N. W. (N. Y.) 360; Van Hess v. Rainbolt, 2 Rep. 401.

States, a will of real property must be in writing but it is not always essential that it be written in ink. A will written in pencil is good, and so is one a portion of which is in print, either engraved or lithographed.¹ But a will written upon a slate it seems will not do,² for by writing is meant something of a permanent nature. No particular form is required in writing a will. If the intention of the testator is apparent or definitely expressed it is sufficient. But the execution of the will and its requisites depends upon the statute of the State where the testator resides and a substantial compliance is necessary.

§ 79. **Foreign Wills.**—In the absence of statutory enactments the common law doctrine on this subject will prevail. The ordinary probate of a will is no evidence of its execution in an action of ejectment. Where the will itself is in existence and can be produced it is indispensably necessary to produce it, and when it is lost or can not from other causes be produced in evidence, secondary evidence must necessarily be resorted to according to the nature of the case, but whatever proof is made is required to be made before the court in which the action of ejectment is tried. In the ordinary proceedings attendant upon the probate of a will the heir at law has no authority to cross-examine the witness, neither are the same solemnities required to admit the will to probate as are indispensable to give it validity as a devise of real estate. In ancient times it was at first a question of controversy between the common law and ecclesiastical courts, whether a will, containing a devise of lands, should not be precluded from probate, although containing a bequest of personalty also, and the question was one of serious import, since the common law courts required the production of the original, whereas the consequence of probate was, that the original should be consigned to the archives of the court that proved it. This was at length compromised and the practice introduced of delivering out the will, when necessary, upon security to return it.³

§ 80. **Proof of Foreign Wills—A Question of Practice.**—Under the statutes of many States the original will must be

¹ In re Dyer, 1 Hagg. Ecc. 219; ³ Darby's Lessee v. Mayer, 10 Dickson v. Dickson, 1 Ecc. Rep. 222; Wheat. (U. S.) 465.

¹ Redfield on Wills, 166.

² Reed v. Woodward, 32 Leg. Int.

deposited in the court of probate, and as the law does not allow it to be removed it is of course impossible to produce it upon the trials of real actions in other States. A certified copy of the will and proceedings upon it may be obtained from the proper custodian of these records, but in States where certified copies are not competent evidence sufficient to pass the title of lands devised by the will, resort must be had to a commission, and the will must be proved as other instruments out of the State are proved when it is impossible to compel their production in court.¹

§ 81. **The Rule at Common Law.**—At common law the probate of a will was conclusive as to personal property but was no evidence as to the execution or validity of the will so far as it affected real property.² At common law as to real estate the will itself, on being duly proved in an action of ejectment or other suit affecting the title to realty, became a muniment of title.³ But this rule of the common law has been changed in England as well as in many of the American States.⁴ In Wisconsin no will is effectual to pass either real or personal property unless it has been proved and allowed in the County Court according to the provisions of the statutes or on appeal in the Circuit Court or in the Supreme Court, and when so proven and allowed the will is expressly made “conclusive as to its execution,”⁵ but it must be borne in mind that these provisions have no application to wills proven without the State.

§ 82. **The Rule Under Statutes.**—The rules governing wills of real property as muniments of title will be found in the common law, or in the statutes of those States where it has been modified or abolished altogether. In some States authenticated copies of foreign wills, testaments and codicils, duly executed, and proved agreeably to the laws and usages of the State or county where executed, may be recorded and thereupon become available in law in like manner as though executed and proven

¹ Robertson v. Pickerell, 100 U. S. Y. 214; Baylon v. Meeker, 28 N. J. 608 (1883). Law 274, 303; Newman v. Water-

² 1 Daniell's Chancery Practice, 877; man, 63 Mich. 877.

Abbott's Trial Evidence, 110; Newman v. Waterman, 63 Wis. 612.

⁴ 1 Daniell's Chancery Practice, 877; 1 Jarman on Wills, 50; Abb. Trial

³ Cotton v. Ross, 2 Paige Ch. (N. Y.) 396; Bowen v. Idley, 6 Paige Ch. (N. Y.) 46; Brady v. McCasker, 1 N.

Evidence, 110, Sub. 60.

⁵ Newman v. Waterman, 63 Mich. 877; 23 N. W. Rep. 696.

within the State. In other States copies are required to be proven in the courts of the State in the same manner as original wills, executed within the States. As illustrations of these systems we quote the statutes of Illinois and Massachusetts:

(1) *Wills proven without the State—Illinois.*

All wills, testaments and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the Territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this State, accompanied with a certificate of the proper officer or officers that said will, testament, codicil, or copy thereof, was duly executed and proved, agreeably to the laws and usages of that State or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law, in like manner as wills made and executed in this State.¹

(2) *Allowance of foreign wills—Massachusetts.*

SECTION 15. Any person interested in a will proved and allowed in any other of the United States, or in a foreign country, according to the laws of such State or country, or in a will which, according to the laws of the State or country where it is made, is valid without probate, may produce to the Probate Court, in any county in which there is any real estate, real or personal, on which such will may operate, a copy of such will and of the probate thereof, duly authenticated, or, if such will is valid without probate as aforesaid, a copy of the will, or the official record thereof, duly authenticated by the proper officer having custody of such will or record in such State or country; and the court shall thereupon assign a time and a place for a hearing, and shall cause notice thereof to be given to all persons interested by publication in some newspaper three weeks successively, the first publication to be thirty days at least before the time assigned for the hearing.

Sec. 16. If at such hearing it appears from the copies before the court, and such additional proof as to the authenticity and execution of the will as may be presented, that the instrument ought to be allowed in this commonwealth as the last will of the deceased, the court shall order the copy to be filed and recorded, and the will shall then have the same force and effect as if it had been originally proved and allowed in the Probate Court in the usual manner.²

In an action of ejectment for land in Tennessee, the defendant endeavored to trace title to the premises through the will of one Kitts. For that purpose a copy and probate of the will devising the property were produced in evidence certified from the Orphans' Court of Baltimore County, Maryland, and admitted against the objection of the plaintiff. The court held the record inadmissible, and in its opinion explained the common law doctrine as to what was legal evidence in an action of ejectment to establish a devise of real property. It is stated that the ordinary's probate was no evidence of the execution of the will in ejectment; that where the will itself was in exist-

¹R. S. Ill. 1845, 538, § 8; R. S. 1889, ²R. S. Mass. 1882, 749, §§ 15, 16.
1898, § 9.

ence and could be produced, it was necessary to produce it, and that when the will was lost or could not be produced, secondary evidence was necessarily resorted to, but that, whatever the proof, it was required to be made before the court that tried the cause, the proof before the ordinary being *etc. parte*, the heir at law having no opportunity to cross-examine the witnesses, and the same solemnities not being required to admit the will to probate which are indispensable to give it validity as a devise of real property. And the court added that the law of Maryland, with regard to the evidence of a devise in ejectment, was the common law of England, and had been so recognized in decisions of the courts of that State. *Robertson v. Pickrell*, 109 U. S. 608 (1883); *Darby v. Mayer*, 10 Wheat. 468, 469.

By the law of Ohio, before a will devising real property can be considered as valid, it must be presented to the Court of Common Pleas of the county where the land lies for probate, and be proved by at least two of the subscribing witnesses, unless it has been proved and recorded in another State according to its laws, in which case an authenticated copy may be offered for probate without proof by the witnesses. A will devising real property in that State was admitted to probate in the State of Pennsylvania, and the Supreme Court of the United States held that such probate gave no validity to the will in respect to real property in Ohio, as to which the deceased was to be considered as having died intestate. *McCormick v. Sullivant*, 10 Wheat. 202, 203; *Robertson v. Pickrell*, 109 U. S. 608.

§ 83. **Forfeitures of Estates by Breaches in Conditions of Wills and Deeds.**—Conditions which destroy an estate are taken strictly; and although a forfeiture must be enforced when clearly established, it should not prevail upon doubtful constructions of evidence. If anything is to be done as a condition precedent by the party who asserts the forfeiture, he must show a strict performance on his part; and this is so, whether the obligation upon him is created by express stipulation or is implied by law from the nature of the act to be performed by the other party. He who may lose by a breach of the condition, must be plainly put in the wrong; and mere words, on his part, as a denial of the right, without any act done, will not always work a forfeiture.¹

Application of the rule.

Gertrude Hogeboom was one of the six heirs at law of Johannes Hogeboom, who died in 1814 seized of a large farm. Her father left a will by which he devised all his real estate to his wife for life, with remainder to his son Stephen, "upon condition and with the proviso and restrictions that he pays so much of honest debts and funeral charges, and pays the

¹ *Hogeboom v. Hall*, 24 Wend. (N. Y.) 146; *Manard's Case*, 7 Co. 112; *Bac. Abr.*, Condition, O, Sec. 1; *Com. Fraunces' Case*, 8 Id. 177; also reported by the name of *Miller v. Francis*, 21 Pick. (Mass.) 389.

legacies, and supports my daughters, Gertrude and Helen, as hereinafter mentioned." He then gave several legacies; and in relation to his daughters, Gertrude and Helen, he provided as follows: "I direct that (after the death of my wife) they shall reside with the family of my son Stephen, or have the use and occupation of my east upper room as they choose; and I direct that son Stephen, his heirs, executors or administrators, support them with good victuals, drink and every-day apparel, and provide them with sufficient firewood, ready cut to put on the fire, as long as they remain in the situation above mentioned (unmarried)." The widow survived the testator some years. The son Stephen paid the debts, funeral expenses and legacies given by the will. The daughters lived in the family of Stephen for about nine years, when they removed to another county with the intention of residing there permanently. They occasionally visited Stephen and one occasion, about ten years after they moved away, they came on a visit in the fall and stayed until June following. About two weeks before they left, Stephen told them if they called it a visit he thought they had stayed about long enough; that he thought they had no right there because they had gone away of their own accord and had long lost all claim under the will. About a year after this the death of Stephen occurred. He left a will, under which his executors sold the land to John L. Hogeboom, who afterward sold a part of it to Thomas F. Messick and the other part to Truman Hall. In 1839 Gertrude Hogeboom brought an action of ejectment against Hall for the recovery of an undivided sixth part of the portion conveyed to him. On the trial she recovered. The defendant moved in the Supreme Court for a new trial on a bill of exceptions. In allowing the motion Bronson, J., said: "When Stephen told the daughters he thought they had no right there—that they had lost all claim under the will—they seemed to have acquiesced in his opinion. They made no reply or objection to the remark. They left him at liberty to believe that they were only there for a temporary purpose, without intending to claim anything under the will, and went away two weeks afterward without correcting that impression; and now, after he is dead, and the farm has gone into the hands of others, they insist that Stephen forfeited the estate. That will never do. They were bound to speak at the time. What Stephen said amounted to little or nothing more than the expression of his opinion, and if such words could under any possible circumstances amount to a breach of the condition, they certainly could not work any such consequences when they were apparently acquiesced in by the other party. If the daughters had answered by asserting their claim, it is highly probable that Stephen, whatever might be his opinion about the matter of right, would have furnished the support so as to avoid all questions about the title to the farm. But, however that may be, there is not sufficient evidence that he ever refused compliance with the terms of the will." *Hogeboom v. Hall*, 24 Wend. (N. Y.) 146.

§ 84. Judicial Proceedings as Muniments of Title—Titles Divested Under Judicial Sales.—Titles of real estate are very frequently divested from the owners and transferred to other persons by sales made under judicial proceedings. The absolute or effectual transfer of the title in these cases depends upon

the regularity of the proceedings and the jurisdiction of the court in which the judgment or order is entered.

The proceedings under consideration and the titles based upon the sales made thereunder so far as the validity of such sales is concerned may be divided into two classes.

(1.) Sales void because the court had no authority to enter the judgment or order of sale.

(2.) Sales void because of some departure from the law in the subsequent proceedings.

Accurately speaking, a sale and the title derived therefrom is not void unless it has no force or effect whatever and is incapable of ratification or confirmation. Perhaps a more proper test of those void acts and deeds under consideration is that their invalidity may be taken advantage of by strangers and in collateral proceedings.¹

§ 85. **Sales Varying in Degrees of Invalidity.**—The sales under consideration may be void as between same persons and valid as between others. (1) The proceeding under which the sale is made may, on account of some defect or irregularity, be an absolute nullity, and the sale void as to all intents and purposes; (2) or the proceedings may be void only as between the parties to them and may be set aside or vacated only in the manner provided for by law. In the former case the sale conveys no title, and the invalidity of the proceedings may be taken advantage of by strangers to the record or third persons in collateral proceedings. In the latter case the rule is different. The proceedings may be defective, but the sale may nevertheless convey an equitable title to the real estate assumed to be sold. Some sales are void and confer no title upon the original purchaser, and yet in the case of his sale to an innocent vendee for a valuable consideration, in good faith and without notice, they become valid, both at law and in equity.²

§ 86. **Jurisdiction of Courts.**—Judicial proceedings are void when the court in which they are had is without jurisdiction. Jurisdiction is indispensable to the validity of all judicial proceedings. Jurisdiction is conferred upon courts by the laws of the States in which they exist. The power to hear and determine controversies of specified character is designated

¹ *Boyd v. Blankman*, 29 Col. 35; 87 *Freeman on Void Judicial Sales*, § 1. *Am. Dec.* 746; *Anderson v. Roberts*, ² *Freeman on Judicial Sales*, § 1. 18 *Johns. (N. Y.)*; 9 *Am. Dec.* 235;

as jurisdiction of the subject-matter. It is conferred by the law, and generally, though not necessarily so, by the law which creates the court. In addition to jurisdiction over the subject-matter it is indispensable that the court should have jurisdiction over the person if the proceedings are *in personam*, or the thing, if the proceedings are *in rem*, against whom or which its judgment is to operate. Jurisdiction over the subject-matter of the controversy must be conferred by law; it can not be given by the consent of the parties. If the order or judgment on which a sale is made is one in which there is a want, in the court, of jurisdiction over the subject-matter of the controversy, the sale is incurably void. Jurisdiction over the parties to the controversy may be and often is conferred by consent; but if it is not so conferred or obtained in the manner provided for by the law the judgment rendered is void and so is a sale of property under it. Hence, to render a valid order or judgment the court must have jurisdiction of the subject-matter of the controversy and of all parties interested in it, or the thing to be affected by it.¹

Jurisdiction by consent.

Consent which confers jurisdiction is usually evidenced by the appearance of the parties in court, and a general appearance is usually sufficient for the purpose. *Kelly v. Donlin*, 70 Ill. 378; *Carlisle v. Weston*, 21 Pick. (Mass.) 535; *Thornton v. Leavitt*, 63 Me. 384; *Galt v. Brigham*, 41 Mich. 227; *Shaw v. Nat. Bk.*, 49 Iowa, 179; *Wheelock v. Lee*, 74 N. Y. 495.

Who are capable of consenting: Jurisdiction conferred by consent must be of persons capable in law of consenting. Jurisdiction of minors and other persons under disability can only be acquired in the manner required by law. An appearance by them will not confer jurisdiction. *Helms v. Chadbourne*, 45 Wis. 60; *Sullivan v. Blackwell*, 28 Miss. 737; *Bonnell v. Holt*, 89 Ill. 71; *Carver v. Carver*, 64 Ind. 194.

Of the subject-matter: But neither the consent nor an appearance by the parties, pleading to the merits or going to trial will confer jurisdiction upon the court of the subject-matter in cases where it is not conferred by law. *Hunt v. Hunt*, 72 N. Y. 217; *Nazro v. Cragin*, 3 Dill. (U. S.) 474; *Lawrence v. Willcock*, 11 A. & E. 941; *Vose v. Morton*, 4 Cush. (Mass.) 27.

¹ *Freeman on Judgments*, § 119; *Lafayette Bk.*, 3 McLean (U. S.) 587; *Dakin v. Deming*, 6 Pal. Ch. (N. Y.) 379; *Campbell v. Wilson*, 6 Tex. 379; *Mc-95*; *White v. Gibbs*, 20 How. (U. S.) 300; *Minn v. Hamilton*, 77 N. C. 300; 541. Where the court has jurisdiction of the subject-matter of an action consent of the parties gives jurisdiction of the person. *McLean v. Asken*, 48 Ark. 151.

§ 87. The Question of Jurisdiction, How Determined.—

The question of the validity of judicial proceedings arises most frequently in cases where judicial, execution or probate sales are attacked in collateral proceedings. In determining the question as to whether the court entering the judgment, order or decree under which the sale is made, had jurisdiction over the person of the defendant, the first inquiry will be to ascertain whether the court was one of general jurisdiction or of special or limited jurisdiction; or, in other words, whether the court is or is not a court of record. The scope of the inquiry must in all cases be confined to the laws of the State in which the court exists. If the court is one of record, the question can as a general rule be decided with comparative ease, but if it is one not of record, no presumption can be indulged. Its jurisdiction must always be affirmatively shown.¹

§ 88. Presumptions as to Jurisdiction—The Rule as Applied in Actions of Ejectment.—A superior court or court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgments it renders, until the contrary appears; and this presumption embraces jurisdiction of the subject-matter of the action in which the judgment is rendered as well as the parties to the action. With respect to inferior courts or courts of limited jurisdiction the rule is different; their jurisdiction must affirmatively appear by sufficient evidence or proper averments in the record or these judgments will be deemed void on their face.²

§ 89. These Presumptions Arise in Respect to Jurisdictional Facts Where the Record is Silent.—The presumption which the law implies in support of the proceedings of superior courts or courts of general jurisdiction arise only with respect to jurisdictional facts concerning which the record is silent. When the evidence is stated in the record, or an averment made with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than averred.³

¹ Freeman on Void Judicial Sales, 79 Ill. 228; Nations v. Johnson, 24 How. (U. S.) 195; Shumway v. § 8.

² Galpin v. Page, 85 U. S. (18 Wall.) 350 (1873); see also Black v. Epperson, 350 (1873); Stillman, 8 Cow. (N. Y.) 292.

³ Galpin v. Page, 85 U. S. (18 Wall.) 4 Tex. 162; Slacumb v. Providence, etc., Co., 10 R. I. 112; Turner v. Jen-

§ 90. **Special Proceedings in Courts of General Jurisdiction**—(1) *The rule in the Federal courts:* When special powers are conferred upon a court and brought into action according to the course of the common law, that is in the usual form of common law and chancery proceedings, by regular process and personal service, when a personal judgment or decree is asked for, or by seizure or attachment of the property where a judgment *in rem* is sought. The same presumption of jurisdiction will usually attend the judgments of the courts, as in cases falling within its general powers.¹ But where the special powers conferred are exercised in a special manner and not according to the course of the common law, or where the general powers of the court over a class of cases not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.² (2) *The rule in the State courts:* This rule seems to be well settled in the Federal courts. In the State courts, however, a more rigid rule is enforced; it is perhaps but natural that they should guard more rigidly the interest of their citizens and examine more closely into the court's exercise of jurisdiction. In these courts it seems to be the rule that the general jurisdiction of a superior court of a State extends to all matters and suits at common law and in chancery, and when so acting it is a superior court or court of general jurisdiction, and, nothing shall be intended to be out of the jurisdiction of such court but that which appears to be. But where such courts exercise statutory and extraordinary powers they stand on the same ground and are governed by the same rules of law as superior courts or courts of limited jurisdiction, and nothing shall be intended to be within the jurisdiction but that which is so expressly alleged.³

§ 91. **Presumptions Limited to the Territorial Jurisdiction of the Court.**—The presumptions indulged in support of

¹ Harvey v. Tyler, 69 U. S. (2 Wall.) 332; Haywood v. Collins, 60 Ill. 328; Morse v. Presley, 5 Fost. (N. H.) 299;

² Galpin v. Page, 85 U. S. (18 Wall.) 350; Umbarger v. Chaboya, 49 Cal. 525; Johnson v. Von Kettler, 84 Ill. 315.

³ Gray v. Steamboat, 6 Wis. 59;

the judgments of superior courts or courts of general jurisdiction are limited to jurisdiction over persons within the territorial limits and over proceedings which are in accordance with the course of the common law.¹

Where a person is not a resident of the State whose courts assume to render judgment against him and is not served with process within its territory, and does not voluntarily appear and submit himself to the jurisdiction of the court, the judgment can not operate against him in person, whether the service of process was actual or constructive. *Penoyer v. Neff*, 95 U. S. 429; *Belcher v. Chambers*, 53 Calif. 636.

In a proceeding against a non-resident infant, a court can not make service of process upon him outside of the State, and upon such service appoint a guardian *ad litem*. Any judgment rendered upon such service is void. *Ins. Co. v. Bangs*, 103 U. S. 435.

§ 92. Want of Jurisdiction Arising from Other Causes.—

In some cases a court may have jurisdiction over the subject-matter of and the parties to the controversy, but can not proceed because of some disqualification of the judge from acting in the particular case.² Or it may have authority to act at the commencement of the proceedings and afterward become divested of its jurisdiction, either temporarily, as in the adjournment *sine die* of the court, or permanently, as where the court is abolished or its jurisdiction is divested by statute.³

§ 93. *Caveat Emptor*.—The rule of *caveat emptor* applies in all its rigor to judicial sales of real property.⁴ The rule must necessarily apply to these sales, because, from the nature of the transaction, there is no one to whom recourse can be had for indemnity in case of loss from a failure of the title.⁵ In the absence of misconception and of fraud the purchaser must look out for himself. He buys at his risk both as to title and

¹ *Galpin v. Page*, 85 U. S. (18 Wall.) 124, 126; *Anderson v. Foulk*, 2 Har. & G. (Md.) 346; *Thompson v. Monger*, 350 (1873).

² *Hall v. Thayer*, 105 Mass. 219; 7 Am. Rep. 513; *Keeler v. Stead*, 56 Conn. 501; 7 Am. St. R. 320; *Freeman on Judgments*, § 145.

³ *Freeman on Judgments*, § 121.

⁴ *Wells v. Van Dyke*, 106 Pa. St. 101; *Worthington v. McRoberts*, 9 Ala. 297; *Fox v. Mensch*, 3 Watts & S. (Pa.) 444; *Mellen v. Boarman*, 13 S. & M. (Miss.) 100; *Lynch v. Baxter*, 4 Tex. 431; *Bingham v. Maxey*, 15 Ill. 295; *Vandever v. Baker*, 13 Pa. St. 124, 126; *Anderson v. Foulk*, 2 Har. & G. (Md.) 346; *Thompson v. Monger*, 15 Tex. 523; *The Monte Allegre*, 9 Wheat. (U. S.) 616; *Lessee of Corwin v. Benham*, 2 Ohio (N. S.), 36; *Owsley v. Smith*, 14 Md. 153; *Mason v. Wait*, 4 Scam. (Ill.) 127; *Bartholomew v. Warren*, 32 Conn. 102; 85 Am. Dec. 251; *Rohrer on Judicial Sales*, § 459 *et seq.*; *Bryant v. Whicher*, 52 N. H. 159.

⁵ *The Monte Allegre*, 9 Wheat. (U. S. 616.

as to quality, but in cases of fraud the rule does not apply,¹ and it has been held in Pennsylvania that it applies only to open defects, and not to secret defects in the title.²

§ 94. **The Purchaser Not Bound to Look Beyond the Decree.**—It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceedings being *coram judice* can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error.³ “The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchase is as much protected as if the adjudication would stand the test of a writ of error, and so where an appeal is given, but not taken, in the time allowed by law.”⁴

§ 95. **Jurisdiction, When Questioned Collaterally.**—The general rule of law upon this question seems to be well settled that the jurisdiction of a court exercising authority over a subject may be inquired into in other courts where the proceedings of the former court relied on are brought before the latter court by the party claiming the benefit of such proceeding.⁵ In applying this rule distinction is recognized between courts of superior and of inferior jurisdiction. With reference to superior courts jurisdiction is always presumed until the contrary appears; but with reference to inferior courts the jurisdiction must be affirmatively shown by the party who claims a right or benefit under their proceedings.⁶

§ 96. **Impeachment of Judicial Sales Collaterally.**—The rule is well settled that if there is no jurisdiction the proceedings are void, a nullity, and confer no right; they are in no case

¹ Bingham v. Mancey, 15 Ill. 295.

⁵ Pennywit v. Foote, 27 Ohio St.

² Banks v. Ammon, 27 Pa. St. 172. 600; Bissell v. Briggs, 9 Mass. 462;

³ McNitt v. Turner, 83 U. S. (16 Wall.) 352 (1872); Grignon v. Astor, 2 How. 341. Elliott v. Piersol, 1 Pet. (U. S.) 328; Thompson v. Whitman, 18 Wall. (U. S.) 457.

⁴ Voorhees v. Band, 10 Pet. (U. S.), 449; Stow v. Kimball, 28 Ill. 93; McNitt v. Turner, 83 U. S. (16 Wall.) 350. ⁶ Gray v. Larimore, 2 Abb. (U. S.) 542; Galpin v. Page, 13 Wall. (U. S.) 350.

a justification, and will be rejected when collaterally drawn in question.¹

In all cases where a court acts without jurisdiction its judgments and orders are nullities, not voidable only, but void, and absolutely of no effect; they can not bar a recovery or defense asserted in opposition to them even prior to their reversal.²

And where the court has jurisdiction, if from any cause the sale or deed founded upon its proceedings be really void, then such objection is good when made in a collateral proceeding.³

§ 97. **When Not Impeachable Collaterally.**—It is equally well settled that if the subject-matter be within the jurisdiction of the court and is brought before it by proper petition, the validity of the proceedings being brought in question collaterally, they are not void but merely voidable. Errors and irregularities must be reached and corrected by some direct proceeding either before the same court or in an appellate one, and such, too, is the general doctrine.⁴ When a court has obtained jurisdiction it is competent to decide every question arising in a cause, and whether decided correctly or incorrectly, its decisions until reversed are binding not only in the same, but in every other court.⁵ If the jurisdiction over the subject-matter appears on the face of the proceedings in which a sale is made, errors or mistakes can not be examined into when brought up collaterally.⁶

¹ Thompson v. Tolmie, 2 Pet. (U. S.) 157; Shriver's Lessee v. Lynn, 2 How. (U. S.) 43; Wilkerson v. Leland, 2 Pet. (U. S.) 627; Clark v. Thompson, 47 Ill. 27; Morris v. Hogle, 37 Ill. 150; Swigart v. Harber, 4 Scam. (Ill.) 66. Southern Bank v. Humphreys, 47 Ill. 227; Woods v. Lee, 21 La. 505; Covington v. Ingram, 64 N. E. Rep. 123; Iverson v. Loberg, 26 Ill. 179.

² Thompson v. Tolmie, 2 Pet. (U. S.) 157; Shriver's Lessee v. Lynn, 2 How. (U. S.) 43; Elliot v. Piersol, 1 Pet. (U. S.) 328; Morris v. Hogle, 37 Ill. 150. ⁵ Elliott v. Piersol, 1 Pet. (U. S.) 328; Parker v. Kane, 22 How. (U. S.) 14; Grignon's Lessee v. Astor, 2 How. (U. S.) 319; Davis v. Helbig, 27 Md. 452; Wright v. Walbaugh, 39 Ill. 554; Iverson v. Loberg, 26 Ill. 179; Fithian v. Monks & Brooks, 43 Mo. 502; Flor-

³ Cooper v. Sunderland, 3 Clarke (Iowa), 114; Frazier v. Steenrod, 7 Iowa, 346.

⁴ Rorer on Judicial Sales, 171; Thompson v. Tolmie, 2 Pet. (U. S.) 157; Parker v. Kane, 22 How. (U. S.) 14; Alexander v. Nelson, 42 Ala. 462; Duquindre v. Williams, 31 Ind. 444; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 718; Phil. & Trenton R. R. Co. v. Stimson, 14 Pet. (U. S.) 448; Thomas v. La Barron, 8 Met. 355; Iverson v. Loberg, 26 Ill. 179; Weineu v. Heintz, 17 Ill. 257; Florentine v. Barton, 2 Wall. 210, 216; Thompson

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In an action of ejectment involving the effect of an administrator's deed of lands sold for the payment of debts in probate the regularity or legality of the administrator's appointment when the court had jurisdiction can not be inquired into. Whether the appointment be regular or irregular, the person appointed becomes at least the administrator *de facto*, and being such, the matter can not be questioned in a collateral proceeding. *Riley v. McCord*, 24 Mo. 265; *Wright v. Wallbaum*, 39 Ill. 554.

§ 98. **Statutes Imperative and Statutes Directory.**—It must be borne in mind that these rules can not supersede or override the positive statutory requirements, as to matters or proceedings necessary as prerequisites to the validity of a judicial sale. The general rule is that when jurisdiction of the person has never actually attached for want of service of process, or other cause, and thereby statutory sales are declared void, or are not to be made unless certain things appear to have been done, then a deficiency in respect to any of these matters precedent, can not be supplied by intendment or presumption of law, nor upon the principles of *res adjudicata*.

But where these statutes are merely directory in defining the course to be pursued, if the court has, by law, jurisdiction of the subject-matter of the action and jurisdiction of the defendant, actually attaching in some manner according to law, and such jurisdiction has been exercised by the court by adjudication, order or decree, then by intendment of law all questions in regard to such statutory requirements and as to questions necessary to be adjudicated in arriving at the conclusion necessary to be attained, are put to rest by the decision of the court and are binding as *res adjudicata* until reversed for error or set aside by a direct proceeding.

In the former class of cases the sales are void and will be so treated when collaterally drawn in question.¹

In the latter class they are voidable only, and the remedy against them is by an appeal or some other direct proceeding to set them aside.²

v. Tolmie, 2 Pet. (U. S.) 157; *Pursley Thornton v. Mulquinne*, 12 Iowa, 319; *Hays*, 22 Iowa. 1; *United States v.* 549; *Townsend v. Tallant*, 33 Calif. Aredondo, 6 Pet. (U. S.) 709; *Grig-* 45.

non's Lessee v. Astor, 2 How. (U. S.) 205. ² *Saltonstall v. Riley*, 28 Ala. 164; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 102; *Field v. Goldsby*, 28 Ala. 218;

¹ *Rorer on Judicial Sales*, 173; *Tomlinson v. McKay*, 5 Gill. 256; *Cooper v. Sunderland*, 3 Iowa, 114; *Boswell v. Sharp*, 15 Ohio, 447; *Mer-*

§ 99. **Confirmation of the Sale.**—Sales made under executions are not as a general rule required to be confirmed, although it is the rule in some States.¹ But sales made under decrees in chancery and orders of Probate Courts must in general be confirmed by the court rendering the decree or making the order, and where this is required by law such confirmation is essential to the consummation of the sale.² After the sale the matter remains under the control of the court.³ In confirming the sale the court adjudicates upon its legality, and this adjudication supplies all defects in the proceedings, excepting fraud or want of jurisdiction.⁴ It relates back to the date of the sale and can not be attacked in a collateral proceeding.⁵ But the absence of an express confirmation by the court is not always fatal, for the sale may be confirmed by the acts of the parties.⁶

§ 100. **The Confirmation May Be Void.**—If a judicial sale is void, the court having confirmed it upon terms not authorized by law, the purchaser is without title upon which to base an action of ejectment, but if it is erroneous merely, and therefore only voidable, it is good and stands until reversed; it can not be questioned collaterally. The fact that a judgment

rill v. Harris, 6 Foster, 142; Jackson v. Robinson, 4 Wend. (N. Y.) 440; Cockey v. Cole, 28 Md. 276; Morrow v. Weed, 4 Iowa, 77; Little v. Sennett, 7 Iowa, 324; Long v. Burnett, 13 Iowa, 28; Parker v. Kane, 22 How. (U. S.) 14; Voorhees v. Jackson, 10 Pet. (U. S.) 449; Griffin v. Bogart, 18 How. (U. S.) 158; Draper v. Bryson, 17 Mo. 71; Grignon's Lessee v. Astor, 2 How. (U. S.) 242; Miller v. Sherry, 2 Wall. (U. S.) 237; Doe v. Harvey, 3 Ind. 104; Bennett v. Owens, 8 Eng. 177.

¹ In Ohio, Nebraska, and some other States the law requires execution sales to be confirmed. Curtis v. Norton, 1 Ohio, 278; Deputron v. Young, 139 U. S. 241 (1889); Gregory v. Tingley, 18 Neb. 322; Volland v. Wilcox, 17 Neb. 50; Rorer on Judicial Sales, § 106.

² Wagner v. Cohen, 6 Gill (Md.) 97;

46 Am. Dec. 660; Freeman on Void Judicial Sales, §§ 42, 43.

³ Brown's Appeal, 68 Pa. St. 53; Mitchell v. Harris, 43 Miss. 314; Herman on Executions, 432, § 261.

⁴ 12 Am. and Eng. Ency. 219; Herman on Execution, 434, § 261; Berlin v. Melborn, 75 Va. 639; Wilkerson v. Allen, 67 Mo. 502; Williamson v. Berry, 8 How. (U. S.) 495; Koehler v. Ball, 2 Kan. 161; Harrison v. Harrison, 1 Md. Ch. 331.

⁵ Wilcox v. Roben, 24 Neb. 368; 38 N. W. Rep. 844; Corkey v. Cole, 28 Md. 276; Willis v. Nicholson, 24 La. 548; McRae v. Danner, 8 Oreg. 63; Hotchkiss v. Cutting, 14 Minn. 537; 12 Am. and Eng. Ency. 219.

⁶ Redus v. Hayden, 43 Miss. 614; Moore v. Greene 19 How. (U. S.) 69; Smith v. Wort, 64 Ala. 34; Harteau v. Eastman, 6 Wis. 410; 12 Am. and Eng. Ency. 220.

was erroneous and might have been reversed upon a writ of error does not destroy a sale made under it while it remains in force and not reversed.¹

§ 101. **Purchaser at Executor's Sale in Nebraska.**—It is the settled law of Nebraska that the title of a purchaser at an execution sale depends, not alone upon his bid or payment of the purchase money, but upon the confirmation of the sale; also that one purchasing at an execution sale submits himself to the jurisdiction of the court as to matters affecting that sale, and that a court has power during the term to vacate or modify its own orders or to rescind decrees.²

§ 102. **The Sheriff's Deed as a Muniment of Title—The Rule at Common Law.**—The rule of the common law is, that he who affirms the existence of a material fact, must prove it.³ So when a party sets up title to land under a sheriff's sale, it is incumbent on him to show a judgment rendered by a court of competent jurisdiction, and a valid execution issued thereon, as well as to produce the sheriff's deed; for it is only in satisfaction of judgments that the law, subjecting lands to the payment of debts, authorizes them to be sold. The sheriff derives his authority to sell from the judgment and execution, and not by reason of any interest he has in the property. Not to require the production of the judgment, is to say that a man's estate may be divested without the judgment of his peers or the law of the land.⁴

§ 103. **The Judgment and Execution Must be Produced.**—It is a principle of natural justice, that no person should be deprived of his property without notice and an opportunity of defending. Not to require the execution to be produced would be equivalent to holding that the judgment in itself divests the title of the owner. The protection of property against rapacity and fraud would be slight indeed, under the operation of such a principle. To afford this very protection the rule of law is well settled that the existence of the execution,

¹ Brobst v. Brock, 10 Wall. (U. S.) 519; Gibson v. Lyon, 115 U. S. 439 (1885).

² Deputron v. Young, 134 U. S. 241 (1889); Phillips v. Dawley, 1 Neb. 320; Bank v. Green, 10 Neb. 134; Volland v. Wilcox, 17 Neb. 50; Gregory v. Tingley, 18 Neb. 322.

³ Hinsman v. Pope, 1 Gil. (Ill.) 131; Dranguet v. Prudhomme, 3 La. 83; Costigan v. Mohawk, etc., 2 Denio (N. Y.), 609.

⁴ Wheaton v. Sexton, 4 Wheat. (U. S.) 503; Ware v. Bradford, 2 Ala. 676; McEntyre v. Durham, 7 Ired. (N. C.) 151.

and the judgment upon which it rests, are matters to be proved affirmatively by the claimant under a sheriff's deed. The judgment is the foundation of the right to subject the land to the payment of the debt, and the execution constitutes the authority of the sheriff to sell. When a party commences his action he assumes the affirmative that a judgment has been rendered, and an execution issued upon it, and the records and files of the court furnish him with plenary evidence to sustain his title, if he has one.¹

§ 104. **Requisites to a Recovery Under a Judgment Title—Sheriff's Deed Impeached.**—Ordinarily a plaintiff who seeks to recover the possession of lands or tenements under a judgment title is only required to show a valid judgment, execution and sheriff's deed, but if the deed recites an assignment of the certificate of purchase and the plaintiff reads the certificate in evidence, from which it appears that it was not assigned, it will impeach the deed and prevent a recovery.²

§ 105. **What Is a Valid Judgment.**—A judgment is the decision or sentence of the law pronounced by the court or other competent tribunal in a proceeding therein; to be valid it must be rendered by a competent court having jurisdiction of the subject-matter of, and the parties to the action in which it is rendered. It must be rendered at a time and place appointed by law for the holding of the court, and must be confined to the matters in controversy. It must specify the parties affected thereby, the amount of the damages or recovery, and be in the form required by law.³

A judgment in the following words, to wit—

“This day (it being the second day of the term) come the plaintiffs, by A. M. & H. W. A., their attorneys; and evidence of service of process upon the defendant being duly had; and he, being three times solemnly called, comes not, but herein makes default, it is therefore considered by the court that the plaintiffs have sustained damages by reason of non-performance of certain promises in plaintiff's declaration mentioned; but because these damages are unknown to the court, therefore the clerk is ordered to assess and report the same. Whereupon the clerk assessed and reported the sum of four hundred and sixty-one and fifty-three one-hundredths damages.

¹ Wheaton v. Sexton, 4 Wheat. ³ 1 Bouvier's Law Dic., 676; 12 Am. (U. S.) 503; Ware v. Bradford, 2 Ala. and Eng. Ency., 59, *et seq.*; Free-676; McEntyre v. Durham, 7 Ired. man on Judgments, § 14. (N. C.) 151.

² Carpenter v. Sherry, 71 Ill. 427 (1874).

Which is by the court approved; and thereupon it is adjudged that the plaintiffs recover of the defendant their damages aforesaid assessed, and also their costs in this behalf expended, and that they have execution therefor," was entered by the Circuit Court in a case therein pending. It was objected to as void.

In passing upon the sufficiency of this judgment Mr. Justice Craig, of the Supreme Court of Illinois, said: "The judgment is for four hundred and sixty-one and fifty-three one hundredths damages. Whether this amount is cents, mills or what, we are left entirely to conjecture. We have no right to indulge in presumptions as to what was found by the court; we must take the record as it reads. A judgment should be for a certain and definite sum of money. This judgment is not for any sum of money, and can only be regarded as a nullity." *Carpenter v. Sherry*, 71 Ill. 429 (1874); *Lawrence v. Fast*, 20 Ill. 338; *Pittsburgh, etc., Ry. Co. v. City of Chicago*, 53 Ill. 81.

§ 106. **What is a Valid Execution.**—The execution must be under the seal of the court and be signed by the clerk in his official capacity. It must follow and correspond with the judgment,¹ but mere clerical mistakes or failures to recite the judgment with strictness will not ordinarily render the execution void.²

Irregular and voidable executions can not ordinarily be attacked in a collateral proceeding.³

§ 107. **Sales Under Irregular Executions, When Void and When Voidable.**—There is some conflict upon this subject, but the weight of authority, it is believed, establishes the proposition that where the law expressly directs that process shall be in a specified form, and issued in a particular manner, such a provision is mandatory, and a failure on the part of the official whose duty it is to issue it, to comply with the law in that respect, will render such process void. On the other hand, it is well settled that there are many merely formal defects which do not have that effect. To illustrate, where the statute or constitution expressly requires that process shall issue under seal of the courts, and be tested in the name of and signed by the clerk, the failure to comply with either of these require-

¹ *Harmon v. Larned*, 58 Ill. 167; (N. Y.) 711; 13 Am. Dec. 568; *Will-
Prescott v. Prescott*, 62 Me. 428; *Iams v. Weaver*, 94 N. C. 134; *Erwin
Shackleford v. Hooper*, 65 Ga. 366; *v. Dundas*, 4 How. (U. S.) 77.

Sprott v. Reid, 3 G. Greene (Iowa), 489; 56 Am. Dec. 589. ³ *Johnson v. Murray*, 112 Ind. 154;
Bacon v. Cropsey, 7 N. Y. 195; *Swig-*

² *Hildreth v. Thompson*, 16 Mass. 489; *gart v. Harber*, 4 Scam. (Ill.) 364; 39
191; *Woodstock v. Bennett*, 1 Cow. Am. Dec. 418.

ments would, as it is believed, according to the weight of authority, render the process void.

The legislature, or the people, through the constitution, have the unquestionable right to say of what process shall consist, and when they have declared that it shall be a specified form, by implication all other forms are prohibited. If such laws are merely directory, then writs are as valid without their observance as with it, and every clerk would be at liberty to issue process in whatever form might suit his fancy. If one of these requirements may be omitted, all may on the same principle. Under such a system one clerk might conclude that the ceremony of attaching a seal was idle and useless. Another might think that the writ would be sufficient with the seal, and that the addition of the name of the clerk would therefore be superfluous. Another might think that all the requirements of the law are but idle ceremonies, and for them substitute something altogether different.¹

A writ not running in the name of the people is absolutely void: In an action of ejectment when the plaintiff as the source of his title relied upon a sale under a fee bill which did not run in the name of the people as required by law, the court properly refused to permit it to be read in evidence for that reason. The failure to comply with the requirements of the law rendered the fee bill and sale under it absolutely void. *Ferris v. Crowe*, 5 Gil. (Ill.) 96; see also *Gilbreath v. Kirkendall*, 1 Ark. 50; *Estele v. Bailey*, Id. 131; *Hutchins v. Edson*, 1 N. H. 139; *Fowler v. Watson*, 4 Mo. 27; *Little v. Little*, 5 Mo. 237; *Reddick v. Claud's Adm.*, 2 Gil. (Ill.) 670; *Sidwell v. Schumacher*, 99 Ill. 426 (1881).

Void for want of the clerk's signature: When the validity of a sale of real estate under an execution to which the clerk of the court from which it was issued had inadvertently omitted to sign his name was under consideration, *Mulkey, J.*, of the Supreme Court of Illinois, after citing the statute, said: "That the writ must be signed by the clerk is made indispensable by this enactment. The signature is as essential under this law as is the seal or other specific requirement and in its absence the writ must be held to confer no power upon the officer to whom it was directed." *Sidwell v. Schumacher*, 99 Ill. 426 (1881); see also as to the want of a seal, *Beal v. King*, 6 Ohio, 11; *Moore v. Detchwandry*, 11 Mo. 431; *Morsor v. Branshaw*, 27 Mo. 351; *Ins. Co. v. Hallock*, 6 Wall. (U. S.) 536.

§ 108. Sales of Real Property Under Void Process—A Review of the Authorities.—Whatever may be the law with respect to the power of courts to allow amendments to writs before judgment, or where the parties have appeared without objection in obedience to defective or even void process, must

¹*Sidwell v. Schumacher*, 99 Ill. 433 (1881).

depend to some extent upon local enactments; it has little application to final process. A review of the authorities clearly warrants the conclusion that a sale of land under an execution or other final process of a court, which does not conform to the requirements of the law in not running in the name of the people, not being under the seal of the court, signed by the clerk, or directed to the proper officer, is absolutely void, and may be successfully resisted in any kind of a proceeding or in any forum in which the question may arise.¹

§ 109. **What is a Valid Deed—Requisites.**—The sheriff's deed must contain a sufficient description of the property sold,² and if the description is so defective as to render the identity of the property uncertain the deed is void.³ It must be under seal where the law requires conveyance of real estate to be sealed.⁴ It must be executed by the sheriff or by his general deputy, and if executed by the deputy it must be in the name of the sheriff.⁵

The purchaser at the sale, or his assignee, is the proper grantee. In many States the form of the sheriff's deed is prescribed by statutes, but in general, these statutes are merely directory, and immaterial departures from the statutory form are not usually fatal if the deed is otherwise sufficient in substance.⁶ The deed must contain apt words of conveyance showing the act done by the sheriff in his official capacity,⁷

¹ Sidwell v. Schumacher, 99 Ill. 426 (1881).

² Allday v. Whittaker, 66 Tex. 669; Lewis v. Owen, 64 Ind. 446.

³ Herman on Executions, 475, § 294; 12 Am. and Eng. Ency. 221; Boardman v. Reed, 6 Pet. (U. S.) 328; Wright v. Pond, 10 Conn. 255; Winkler v. Higgins, 9 Ohio St. 599; Richardson v. State, 6 Blackf. (Ind.) 51; Hughs v. Streeter, 24 Ill. 647; 76 Am. Dec. 777; Clemmens v. Rannells, 34 Mo. 579; Deloach v. Bank, etc., 27 Ala. 437; Childs v. Ballow, 5 R. I. 537; Head v. James, 13 Wis. 641; Parker v. Swan, 1 Humph. (Tenn.) 80.

⁴ Morson v. Branham, 27 Mo. 351; Rorer on Judicial Sales, § 842.

⁵ Rorer on Judicial Sales, § 942;

Keller v. Blanchard, 21 La. An. 38; Evans v. Wilder, 7 Mo. 359; Car v. Hunt, 14 Iowa, 206; Jackson v. Bush, 10 Johns. (N. Y.) 223; Robinson v. Hall, 33 Kan. 139; Samuel v. Shelton, 48 Mo. 444; Anderson v. Brown, 9 Ohio, 151; Freeman on Void Judicial Sales, § 46.

⁶ Freeman on Executions, § 329; Perkins' Lessee v. Dibble, 10 Ohio, 433; 36 Am. Dec. 97; Holman v. Gill, 107 Ill. 467; Tanner v. Stine, 18 Mo. 580; 59 Am. Dec. 320; Brooks v. Rooney, 11 Ga. 423; 56 Am. Dec. 430; Hoskins v. Wollett, 63 Tex. 213; Keith v. Keith, 104 Ill. 401.

⁷ Rorer on Judicial Sales, § 946; Johnson v. Bantock, 38 Ill. 111.

and in general it should contain all the essential parts and be executed and delivered in like manner as other deeds of conveyance of real estate.

§ 110. **Impeachment of the Sheriff's Deed.**—The rule seems to be well settled that a sheriff's deed on execution sale, to a purchaser in good faith, if regular in itself, can not be impeached in a collateral proceeding for a mere error or irregularity in the proceedings, judgment, execution, or return, or for want of a return if there be a valid judgment and execution.¹ The sheriff's deed, though it can not be impeached in a collateral proceeding for mere errors and irregularities in the proceedings and judgment, if there be a valid judgment and execution, yet where the law requires a seal, his deed, if not under seal, will be void.²

The deed, when made on execution sale to a purchaser in good faith, can not be affected for such irregularities as that the appraisers, where the sale is under an appraisement law, acted without seeing the land: *Jackson v. Vanderlyn*, 17 Johns. (N. Y.) 167; the failure of the sheriff to advertise: *Lawrence v. Speed*, 2 Bibb (Ky.), 101; or the issue of the

¹ *Wood v. Colvin*, 5 Hill (N. Y.), 1 Bald. (U. S.) C. C. 246; *Ashby v. 231; Hines v. Scott*, 11 Pa. St. 19; *Abney*, 1 Hill (S. C.), 380; *Dew v. Maurior v. Coon*, 16 Wis. 465; *Bowen Wright*, 1 Pet. (U. S.) C. C. 64; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 210; *Hinds v. Scott*, 11 Pa. St. 1; *Anderson v. Clarke*, 2 Swan. (Pa.), 280; *Vance v. Readdon*, 2 N. & M. 156; *Dunn v. Merriweather*, 1 Marsh. (Eng. K. B.) 299; *Morrison v. Dent*, 1 Mo. 246; *Dew v. Despeaux*, 7 Halst. (N. J.) 182; *Dew v. Farley*, 7 Halst. (N. J.) 326; *Dew v. Moore*, 7 Halst. (N. J.) 331; *Weyand v. Tipton*, 5 Sergt. & R. (Pa.) 332; *Clark v. Lockwood*, 21 Cal. 220; *Hendrickson v. R. R. Co.*, 34 Mo. 188; *Landes v. Brant*, 10 How. (U. S.) 371; *Landes v. Perkins*, 12 Mo. 254; *Jackson v. Bartlett*, 8 Johns. (N. Y.) 361; *Jackson v. Roosevelt*, 13 Johns. (N. Y.) 97; *Ware v. Bradford*, 2 Ala. 676; *Love v. Powell*, 5 Ala. 58; *Hubert v. McCullum*, 6 Ala. 221; *Cockerell v. Wynn*, 12 S. & M. (Miss.) 117; *Davis v. Wornack*, 8 B. Mon. (Ky.) 383; *Hulup v. Beeson*, 1 Iowa (Greene), 199; *Draper v. Bryson*, 17 Mo. (2 Bennett) 261; *Thompson v. Philips*, 1 Bald. (U. S.) C. C. 246; *Ashby v. 380; Dew v. Wright*, 1 Pet. (U. S.) C. C. 64; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 210; *Hinds v. Scott*, 11 Pa. St. 1; *Anderson v. Clarke*, 2 Swan. (Pa.), 280; *Vance v. Readdon*, 2 N. & M. 156; *Dunn v. Merriweather*, 1 Marsh. (Ky.) 158; *Martin v. McCargo*, 5 Litt. (Ky.) 293; *Smith v. Morrison*, 1 Mon. (Ky.) 154; *Riggs v. Dooley*, 7 B. Mon. (Ky.) 239; *Wilson v. McGee*, 2 Marsh. (Ky.) 602; *Childs v. McChesney*, 20 Iowa, 431; *Willard v. Whipple*, 40 Vt. 219; *Phillips v. Coffee*, 17 Ill. 154; *Bunton v. Emerson*, 4 G. Greene (Iowa), 397; *Cox v. Joiner*, 4 Bibb (Ky.), 94; *Ferguson v. Miles*, 3 Gilm. (Ill.) 358; *Sexton v. Wheaton*, 4 Wheat. (U. S.) 503; *Durham v. Eaton*, 28 Ill. 264; *Jackson v. Roosevelt*, 13 Johns. (N. Y.) 97; *Lovell v. Powell*, 5 Ala. 58; *Ware v. Bradford*, 2 Ala. 676; *Stow v. Steele*, 45 Ill. 328; *Kinney v. Knoeble*, 47 Ill. 417.

² *Morson v. Branham*, 27 Mo. 351; *Moore v. Detchmandry*, 11 Mo. 431; *Rorer on Judicial Sales*, § 842.

execution out of season, or for any fault of the sheriff in not following the statute, if the court has jurisdiction of the cause in which the execution emanated. *Hubbard v. Barnes*, 29 Iowa, 239; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 210; *Barkley v. Screrren*, 1 N. & M. (Eng. K. B.) 408; *Thompaw v. Tohnie*, 2 Pet. (U. S.) 157; *Henry v. Ferguson*, 1 Bailey (S. C.), 512.

In Mississippi the issuing of an execution and sale after the death of the defendant does not affect the sale when attacked in a collateral proceeding. *Harper v. Hill*, 35 Miss. 63. But it is held otherwise in *Erwin v. Dundas*, 4 How. (U. S.) 58.

A deed made to a third person at the request of the purchaser will be valid, but if so made without authority it will be void. *Landrum v. Hatcher*, 11 Rich. L. (S. C.) 54.

§ 111. **Public Documents as Muniments of Title—The General Rule.**—The rule is well settled that every public document which is required by law to be executed by a public officer, and preserved as a memorial of the facts recited in it, must be verified by the official signature of the person who made it. The object of the rule is the identification of the document as an official act, executed by authority of law; and its spirit is answered only when the official character of the person making it is established, and the document appears upon its face to be an official act, attested by the signature of the officer.¹ The rule applies to the execution of all public authorities, whether conferred by general or special laws, where the exercise of the power affects the property of the citizen. The authority is conferred without his consent, he is not consulted in the selection of the agent, he can not control the acts of the officer, nor is the officer answerable to him for his conduct. The authority is delegated by law; it is reposed in the officer, not in the man. He acts in an official capacity. But for the protection of the law he would be a trespasser in exercising the power, and responsible to the citizen for his acts. When, therefore, he attempts to execute the power, he must recognize the source from whence he derives it, follow the requirements of the law and perform all acts in that character alone which the law recognizes, otherwise the act is a nullity.²

§ 112. **Unauthenticated Documents.**—Documents which are not authenticated in any way, either as originals or copies of

¹ *Keller v. Savage*, 20 Me. 199; *v. Smith*, 2 Mich. 498; *Taylor v. Blackwell on Tax Titles*, 409; *John-French*, 19 Vt. 49.

son v. Goodridge, 15 Me. 29; *Sibley* ² *Isaacs v. Shattuck*, 12 Vt. 668.

public or official records, are not admissible as evidence in actions for the recovery of the possession of real estate. So where, in an action involving the title to lands in Wisconsin, originally forming part of an Indian reservation, a table of births in a book once used as a record of the proceedings of the tribe and afterward of the supervisors of the town, and an entry in a merchant's account book, and in another and otherwise blank book looking like an attempted copy of some survey or allotment of lands of the tribe to its members and their families, were held inadmissible as evidence.¹

Execution of document: In ejectment brought, plaintiffs introduced a land patent issued to their ancestor by the State, but lacking the State seal; it was excluded until the plaintiffs introduced evidence to show that the seal was on it when issued. The court then allowed it to go to the jury, but required them to find whether or not the seal was attached when the patent issued: *Held*, erroneous, as the patent should have gone to the jury with an instruction from the court that its validity depended on its due legal execution. *Carter's Heirs v. Edwards*, Va. Legal News, Sept. 5, 1891.

Certified copy: After the refusal of the court to allow the patent to go to the jury, plaintiffs introduced a duly certified copy of said patent to show that the patent, when issued, had been duly signed, sealed, etc., but on exception, the court excluded it: *Held*, this was error, as it excluded from the jury the most conclusive proof of the regularity of the patent. *Ibid*.

§ 113. **Tax Sales and Titles—The General Rule.**—It is a principle of elementary law that statutory provisions in derogation of the common law, by which the title of one person to real estate is to be divested and transferred to another, must be strictly pursued, and any condition and requisite of such statutory provisions having the semblance of a benefit to the owner must be strictly complied with in order to divest his title.² The subject under discussion is very well illustrated by the proceeding for the sale of lands for the non-payment of taxes.

§ 114. **Tax Deeds as Muniments of Title.**—The interests of mankind in modern times seems required that the landed estate of the citizen should contribute its share to the common burdens of the government, and hence involuntary alienations became more or less frequent. The power in the sovereign to sell and

¹ *Fowler v. Shafer*, 69 Wis. 23; 32 N. Y. 299; *Stillwell v. Swartout*, 81 N. Y. W. Rep. 292 (1887). 109; *Ellwood v. Northrop*, 106 N. Y.

² *Atkins v. Kinnan*, 20 Wend. (N. Y.) 172; 12 N. E. Rep. 590. Y.) 241; *Battell v. Torrey*, 65 N. Y.

convey land for the refusal of the owner to discharge these burdens was utterly unknown to the common law. The power to impose a tax upon real property and sell it for non-payment is derived wholly from the statute and not from the consent of the owner. The statute creates the power, selects the agent to execute it, and prescribes the formalities which shall attend its execution.¹

§ 115. **Preliminary Steps—Conditions Precedent.**—In powers of this nature a series of preliminary acts are required by law to precede the execution of the power. Each and every step, from the listing of the land for taxation, to the consummation of the title by the delivery of a deed to the purchaser, is a separate and independent fact. All of these facts, from the beginning to the end of the proceeding, must exist; and if any material link in the chain of title be wanting, the whole record falls to the ground for want of sufficient authority to support it.²

§ 116. **The Validity of a Tax Sale and Deed.**—The validity of a tax sale depends upon the authority of the officer to sell, and upon the fairness of the transaction. It would be going too far to say that the officer selling land with or without authority, could by his mere conveyance, transfer the title of the rightful proprietor. He must act in conformity with the law, from which his power is derived, and the purchaser is bound to inquire whether he has so acted. It is, therefore, held to be a condition precedent to the passing of the title at such sales, that all of the proceedings of the officers who have anything to do with the listing and valuation of the land, the levy and collection of the tax, the advertisement and sale of the property, the return, filing or record of the proceedings, whether the acts are to be performed before or after the sale,

¹ Doughty v. Hope, 3 Denio (N. Y.) (N. Y.), 431; Striker v. Kelly, 2 Denio 595; Sharpe v. Spier, 4 Hill (N. Y.), (N. Y.), 330; James v. Gordon, 1 Wash. 86; Hodge v. Wilson, 12 S. & M. C. C. (U. S.) 335; Fitch v. Pinckard, (Miss.) 498; Natchez v. Minor, 10 S. & 4 Scam. (Ill.) 69.

M. (Miss.) 257; Williams v. Peyton, 4 ² Blakeney v. Ferguson, 3 English Wheat. (U. S.) 77; 4 Pet. Cond. (U. S.) (Ark.), 277; Brown v. Veazie, 25 Me. 394; Varick v. Tallman, 2 Barb. (N. Y.) 362; Doughty v. Hope, 3 Denio (N. Y.), 115-16; Ronkendorff v. Taylor, 4 Pet. 595; Varick v. Tallman, 2 Barb. (U. S.) 349; Powell v. Tuttle, 3 Comst. (N. Y.) 114; Ritch v. Casey, 2 G. (N. Y.) 401; Sherwood v. Reed, 7 Hill Greene (Iowa), 300.

must be in strict compliance with the statute authorizing the sale.¹

§ 117. **Recitals in the Deed, Not Evidence, etc.**—As a general rule the recitals in a tax deed are not evidence against the owner of the property, but the matter so recited must be established by proof from some other source.² Nor is the deed itself upon any conceivable principle of law *prima facie* evidence that the prerequisites of the law have been complied with by the various officers of the law. The burden of proving the regularity of these proceedings rests upon the purchaser at the sale or upon those claiming under him. He must show affirmatively step by step that everything has been done which the statute makes essential to the due execution of the power conferred upon the officers of the law.³ The rule, however, is confined to

¹ *Judevine v. Jackson*, 18 Vt. 472; *Fearson*, 9 How. (U. S.) 248; *Moore Early v. Doe*, 16 How. (U. S.) 610; *v. Brown*, 4 McLean (U. S.), 211; *Lyon v. Burt*, 11 Ala. 295; *Doughty Jackson v. Esty*, 7 Wend. (N. Y.) 148; *v. Hope*, 3 Denio (N. Y.), 595; *Smith Langdon v. Poor*, 20 Vt. 13; *Chandler v. Bodfish*, 27 Me. 295; *Varick v. Tallman*, 2 Barb. (N. Y.) 113; *Blake- French*, 19 Ibid. 49; *Burch v. Fisher*, 13 S. & R. (Pa.) 208; *Huston v. Young v. Martin*, 2 Yeates (Pa.), 312; *Foster*, 1 Watts (Pa.), 478; *Foust v. Shearer v. Woodburn*, 10 Barb. (Pa.) 511; *Morton v. Reed*, 6 Mo. 74; *Parker v. Rule*, 9 Cranch (U. S.), 64; 3 *Pet. (U. S.)* 308; *Ronkendorff v. Taylor*, 4 *Pet. (U. S.)* 349; *Nalle v. Fenwick*, 4 *Rand. (Va.)* 585; *Yancy v. Hopkins*, 1 *Munf. (Va.)* 419; *Farnam v. Buffum*, 4 *Cush. (Mass.)* 267; *Holt v. Hemphill*, 3 *Ham.* 232; 1 *Ohio*, 551; *Lessee of Perkins v. Dribble*, 16 *Ohio*, 433; *Fitch v. Casey*, 2 *G. Greene (Iowa)*, 300; *Reed v. Morton*, 9 *Mo.* 128; *O'Brien v. Coulters*, 2 *Blackf. (Ind.)* 421; *Dentler v. State*, 4 *Blackf. (Ind.)* 258; *Scales v. Avis*, 12 *Ala.* 617; *Bishop v. Lovani*, 4 *B. Mon. (Ky.)* 116; *Wilson v. Bell*, 7 *Leigh*, 22; *Jesse v. Preston and Keith v. Preston*, 5 *Gratt. (Va.)* 120; *Thames Manufacturing Co. v. Lathrop*, 7 *Conn.* 550; *Cushing v. Longfellow*, 26 *Me.* 306; *Hobbs v. Clement*, 32 *Me.* 67; *Brown v. Smith*, 7 *N. H.* 36; *Brown v. Dinsmore*, 3 *Ibid.* 103; *Mason v.*

Keith v. Preston, 5 *Gratt. (Va.)* 120; *Jackson v. Esty*, 7 *Wend. (N. Y.)* 148; *Jackson v. Shepard*, 7 *Cow. (N. Y.)* 88; *Hall v. Collins*, 4 *Vt.* 316; *Brown v. Wright*, 17 *Ibid.* 97; *Mussey v. White*, 3 *Greenl. (Me.)* 302; *Smith v. Corcoran*, 7 *La.* 46.

² *Nalle v. Fenwick*, 4 *Rand. (Va.)* 585; *Nancarrow v. Weathersbee*, 6 *v. Smith*, 7 *N. H.* 36; *Brown v. Martin (Lou.)* 347; *Christy v. Minor*, 4 *Munf. (Va.)* 431; *Holt v. Hemphill*,

controversies between the owner of the tax title and the original owner of the land or those claiming under him.¹

This rule is founded upon the analogies of the common law. In some States, however, it has been changed by statutory enactments,² and in some a different doctrine is held, founded probably upon the presumption that all public, ministerial officers perform their duty according to law.³

§ 118. **The Presumption Discussed.**—The existence of these statutory requirements is not to be made out by intendment, it must be proved. It is not a case for presuming that public officers have performed their duty; but what they have in fact done must be shown. By the common law, which views every invasion of the sanctity of property with peculiar jealousy, an authority to divest the title of another is to be strictly pursued, and as the maxim, "*omnia rite presumunter*," is appropriate but to judicial proceedings, no intendment in respect to the

- 3 Ham. (Ohio) 232; Thompson v. Gotham, 9 Ibid. 170; Latimer v. Lovett, 2 Doug. (Mich.) 204; Emery v. Harrison, 13 Pa. St. 317; Westcott v. McDonald, 22 Me. 402; Lessee of Dunn v. Games, 1 McLean (U. S.), 319. In Kentucky a tax deed is held *prima facie* evidence of title, and the *onus* lies upon the former owner to show irregularity in the sale. Curry v. Fowler, 5 J. J. Mar. (Ky.) 145; Blight v. Banks, 6 Mun. (Ky.) 206; Oldham v. Jones, 5 B. Mon. (Ky.) 458; Bodley v. Hoard, 2 A. K. Marsh. (Ky.) 244; Allen v. Robertson, 3 Bibb. (Ky.) 326; Jackson v. Shepard, 9 Cow. (N. Y.) 88; Dresback v. McArthur, 6 and 7 Ohio, 307; Scott v. Detroit, Y. M. Soc. 1 Doug. (Mich.) 119; Latimer v. Lovett, 2 Ibid. 204; O'Brien v. Coulter, 2 Blackf. (Ind.) 421; Love v. Gates, 4 Dev. & B. (N. C.) 363; Pope v. Headen, 5 Ala. 433; Watson v. Stucker, 5 Dana (Ky.), 581; Terry v. Bleight, 3 Mon. (Ky.) 270; Bishop v. Lovan, 4 B. Mun. (Ky.) 116; Allen v. Smith, 1 Leigh (Va.), 231; Chapman v. Bennett, 2 Ibid. 329; Jesse v. Preston and Keith v. Preston, 5 Gratt. (Va.) 205; Matthews v. Light, 32 Me. 305; Wal-
- dron v. Tuttle, 3 N. H. 340; Minor v. McLean, 4 McLean (U. S.), 138; Mayhew v. Davis, Ibid. 213; Jackson v. Esty, 7 Wend. (N. Y.) 148; Beekman v. Brigham, 1 Seld. (N. Y.) 366; Hall v. Collins, 4 Vt. 316; Brown v. Wright, 17 Ibid. 97; Frost v. Ross, 1 Watts & S. (Pa.) 501; Dikeman v. Parrish, 6 Barr. (Pa.) 210; Morris v. Crocker, 4 Lou. 147; Reeves v. Towles, 10 Ibid. 276; Baker v. Towles, 11 Ibid. 432; Emery v. Harrison, 13 Pa. St. 317; Alvord v. Collins, 20 Pick. (Mass.) 418; Stevens v. McNamara, 36 Me. 176.
- ¹ Bellows v. Elliot, 12 Vt. 569; Huston v. Foster, 1 Watts (Pa.), 488; Foster v. McDivit, 9 Watts, 341; Foust v. Ross, 1 Watts & S. (Pa.) 501; Dikeman v. Parrish, 6 Barr. (Pa.) 210; Dejarnett v. Haynes, 23 Miss. 600; Smith v. Bodfish, 27 Me. 289; Robinett v. Preston, 4 Gratt. (Va.) 141.
- ² Statutes of Illinois, 1887, 895.
- ³ Curry v. Fowler, 5 J. J. Marsh. (Ky.) 145; Blight v. Banks, Mon. (Ky.) 206; Oldham v. Jones, 5 B. Mon. (Ky.) 458; Bodley v. Hoard, 2 A. K. Marsh. (Ky.) 244; Allen v. Robertson, 3 Bibb (Ky.), 326.

exercise of it is to be made in favor of what does not appear; so that every act, the performance of which is made a condition of the divestiture, must be shown by proof. Presumptions are never made for the purpose of upholding the acts of a special agent, whether appointed for public or private purposes; nor can such a presumption be made in favor of ministerial officers where recourse can be had to the authority under which they act, and to the thing itself that is done under it; for that would be to substitute confidence in the officer for the due performance of his duty.¹

§ 119. Statutory Enactments—Tax Deeds as Evidence.—

In some of the States the effect of recitals in a tax deed as evidence is fixed by the statute. As an illustration we quote the statute of Illinois :

Effect of deed as evidence.

SECTION 224. Deeds executed by the county clerk as aforesaid, shall be *prima facie* evidence, in all controversies and suits in relation to the right of the purchaser, his heirs or assigns, to the real estate thereby conveyed, of the following facts:

First. That the real estate conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law.

Second. That the taxes or special assessments were not paid at any time before the sale.

Third. That the real estate conveyed had not been redeemed from the sale at the date of the deed.

Fourth. That the real estate was advertised for sale in the manner and for the length of time required by law.

Fifth. That the real estate was sold for taxes or special assessments, as stated in the deed.

Sixth. That the grantee in the deed was the purchaser or assignee of the purchaser.

Seventh. That the sale was conducted in the manner required by law.²

Under this statute the introduction of the tax deeds in evidence casts the burden upon the land owner of showing:

(1.) That the land in question was not subject to taxation at the time the same was assessed, and had not been listed and assessed in the time and manner required by law.

¹Williams v. Peyton's Lessee, 4 v. Wright, 17 Vt. 97; Blackwell on Wheat. (U. S.) 77; 4 Pet. (U. S.) 394; Tax Titles, 91.

Pope v. Headen, 5 Ala. 433; Jackson v. Esty, 7 Wend. (N. Y.) 148; Brown

(2.) That the taxes or special assessments were paid before the sale.

(3.) That the lands conveyed had been redeemed from the sale at the date of the deed.

(4.) That the land was not advertised for sale in the manner and for the length of time required by law.

(5.) That the land was not sold for taxes or special assessments as stated in the deed.

(6.) That the grantee in the deed was not the purchaser or assignee of the purchaser.

(7.) That the sale was not conducted in the manner required by law.

Or in other words, the law casts upon him who disputes the validity of a tax deed the burden of showing its invalidity in these respects.

§ 120. **Tax Deeds as Evidence Under Statutes.**—In many States statutory enactments are found declaring that the tax deed shall be *prima facie* evidence that certain conditions precedent have been legally complied with. The effect of these statutes is simply to shift the burden of proof upon the party claiming adversely to the deed. But the instant it is shown by such a party that any substantial prerequisite of the law has not been complied with, the *prima facie* character of the deed is destroyed and all of its presumptions are overthrown; the deed itself becomes mere waste paper.¹ And inasmuch as the evidence necessary to destroy the presumptions raised by such a deed is of a negative character, the law does not require of the adverse party, plenary proof; it is enough that he introduces such evidence, as, in the absence of all counter testimony, will afford reasonable ground for presuming that the negative allegation is true; and when this is done, the *onus probandi* is shifted to the party claiming under the tax deed. The *prima facie* character of the deed, as established by the statute, being thus overthrown, the principle of the common law again attaches to the transaction, and the grantee in the tax deed, or those claiming under him, must prove, by satisfactory evidence, the regularity of the proceedings.² This principle

¹ Sibley v. Smith, 2 Mich. (Gibbs) v. Casey, 2 G. Greene (Iowa), 300. 486; Graves v. Bruen, 11 Ill. 431; ² Graves v. Bruen, 11 Ill. 441; Sibley Turney v. Yeoman, 16 Ohio, 24; Fitch v. Smith, 2 Mich. (Gibbs) 486.

conforms to the general law regulating the proof of negative averments.¹

§ 121. **The Officers Who Execute the Power.**—It is a general principle of law, that whenever a right is claimed under the proceedings of one who purports to have acted in an official capacity, the fact that he who did the act upon which the right is based was a public officer, must appear. This is especially applicable to a case where the title to real estate is to be divested under the authority of a statute, and through the intervention of a public officer. The statute being the authority; and the officer the agent to execute it, and no one being empowered to do the act, except the person specially designated in the law for that purpose, it follows that a stranger to the power can not execute it. As a general rule the party claiming title under a tax sale, must show that the acts required to be done under the statute, in order to divest the title of the former owner, were performed by the officers of the law, and not simply by persons who assumed to act in an official capacity. The citizen is entitled to all of the protection against fraud, rapacity and abuse of authority in the sale of his property, which official responsibility can secure.²

§ 122. **The Rule Caveat Emptor Applies.**—The purchaser at a tax sale is chargeable with notice of every irregularity in the proceedings of the officers. He purchases at his peril, the maxim, *caveat emptor*, being rigidly applied to him. The reasons for this are obvious. The law imputes to every purchaser knowledge of all the facts appearing at the time of his purchase, upon the muniments of title, which it was necessary for him to inspect in order to ascertain the sufficiency of it.³ More especially is this doctrine applicable to the purchaser at a tax sale; for, knowing the land to have been sold under color of an authority given by law to a public officer, who is not the owner, he is bound to inquire whether that officer, and

¹ Blackwell on Tax Titles, 431; 1 *Lessee of Holt's Heirs v. Hemp-Greenl. Ev.*, Sec. 78; *Calder v. Ruth-hill's Heirs*, 3 Ham. (Ohio) 232; *Dun-erford*, 3 Broderip & B. 302. *ning v. Smith*, 3 John. C. (N. Y.) 344;

² *Birch v. Fisher*, 13 S. & R. 208; *Stead's Executors v. Course*, 4 Cranch Payson v. Hall, 30 Me. 319; *United (U. S.)*, 403; *Yancy v. Hopkins*, 1 States v. Maurice, 2 Brock. 102; *Mar-Munf. (Va.)* 431; *Games v. Stiles*, 14 shall Dec. 470; *Hildrath v. McIntire*, Pet. (U. S.) 322; *Blackwell on Tax 1 J. J. Mar. (Ky.)* 206; *Boardman v. Titles*, 85. *Holliday*, 10 Paige (N. Y.) 223.

all others whose agency is required by the law in the conduct of the proceedings, have proceeded with regularity in the discharge of their duty. If the proceedings are not in conformity with the law, the fact is as well known to the purchaser as it was to the officer. The law, at least, presumes it to be so.¹

§ 123. **Officers de Jure and de Facto.**—(1) *Officers de jure*: An officer *de jure* is one who has the legal title to, and is clothed with all the power and authority of the office. He has a title against the world, to exercise the functions of the office and receive the fees and emoluments appertaining to it. He is responsible to the government and injured parties, when he abuses his trust or transcends his authority, and his acts, when within the scope of that authority, can not be questioned by a citizen or any department of the government.² (2) *Officers de facto*: An officer *de facto* is one who comes in by the forms of an election or appointment, but in consequence of some informality, omission, or want of qualification, or by reason of the expiration of his term of service, can not maintain his possession, when called upon by the government to show by what title he claims to hold the office. He exercises the duties of the office, under claim and color of right.³

§ 124. **A Mere Usurper.**—A usurper is one who intrudes himself into an office, which is vacant, or ousts the incumbent without any color of title whatever and assumes to execute the duties of the office. His acts are void in all respects.⁴

§ 125. **Distinction Between Officers de Jure and de Facto.**—The consequences naturally arising from the distinction between an officer *de jure* and one *de facto* are well settled. An officer *de jure* is clothed with all the power and authority appertaining to the office, and his acts, within the limits of his authority, can not be questioned anywhere; while the acts of an officer *de facto* are valid so far only as the rights of the public or third persons, having an interest in such acts, are

¹ *Battimore v. White*, 2 Gill & J. Gregg v. Jamison, 55 Pa. St. 468; (Md.) 444; *Yancy v. Hopkins*, 1 Munf. Plymouth v. Painter, 17 Conn. 585; (Va.) 481. *Stale v. Carroll*, 38 Conn. 449; 9 Am.

² *McGregor v. Balsh*, 14 Vt. 29.

Rep. 409; 12 Am. L. Reg. (N. S.) 165.

³ *Hooper v. Goodwin*, 48 Me. 79; ⁴ *Tucker v. Aiken*, 7 N. H. 131. *People v. Statton*, 73 N. C. 546;

concerned. Neither the title of such an officer, nor the validity of his acts as such, can be indirectly called in question in a proceeding to which he is not a party. The effect of this rule is to render the acts of an officer *de facto* as valid and effectual as though he was an officer *de jure*.¹

The general rule is that the acts of an officer *de facto* are valid whenever third persons are interested in the act, but many authorities affirm that the great strictness uniformly exacted in the divestiture of estates, under the taxing power of the government, demands an exception to the rule, and requires proof that those who purport to act in an official capacity in the conduct of these sales, were officers *de jure*; that a regular election or appointment, and a compliance with all the conditions precedent, which must be shown by the officer himself when his title is questioned in a *quo warranto*, such as the taking of the oath of office, the execution of an official bond, etc., must be clearly proven by the party claiming title under the tax sale; and that the usual presumptions can not be indulged in by the courts when the proof of official character is wanting.²

§ 126. **Listing and Valuation of the Land.**—A listing and valuation of the land for taxation, within the time, and in the manner required by law, is essential to the validity of a tax title. This is a prerequisite which can not, under any circumstances whatever, be dispensed with. In a double sense, it is an indispensable prerequisite; (1) to satisfy the plain and unequivocal demands of the statute; and (2) to give life and energy to the statute itself. It is the basis upon which all the

¹ *Plymouth v. Painter*, 17 Conn. (Tenn.) 458; *Fowler v. Bebee*, 9 Mass. 585; *Wilcox v. Smith*, 5 Wend. (N. Y.) 234; *McGregor v. Balch*, 14 Vt. 428; *Schelencker v. Risley*, 3 Scam. (Ill.) 529; *Wilcox v. Smith*, 5 Wend. (Ill.) 483; *Parker v. Baker*, 8 Paige C. (N. Y.) 234; *Blackwell on Tax Titles*, (N. Y.) 429; *The People v. Collins*, 7

John. (N. Y.) 551; *M'Instry v. Tanner*, 9 John. (N. Y.) 135; *Burke v. Elliot*, 4 Ired. (N. C.) 355; *Gilliam v. Reddick*, 4 Ired. (N. C.) 368; *Brush v. Cook*, 1 Penn. 297; *Adams v. Jackson*, 2 Aik. (Vt.) 145; *Hoagland v. Culvert*, 1 Spencer (N. J.) 387; *Farmers' and Merchants' Bank v. Chester*, 6 Humph. 231; *Douglas v. Wickwire*, 19 Conn. 489; *Prickett v. The People*, 1 Gilm. 489; *Ainsworth v. Dean*, 1 Foster (N. H.), 400; *Proprietors of Cardigan v. Page*, 30 Me. 491; *Payson v. Hall*, 30 Me. 182; *Coit v. Wells*, 2 Vt. 318; *Isaacs v. Wiley*, 12 Ibid. 674; *Alvord v. Col- lin*, 20 Pick. (Mass.) 418; *Blackwell on Tax Titles*, 121.

subsequent proceedings rest. The ordinary signification of the term list, is a roll or catalogue. In its technical sense it means a complete enumeration of the owners of property in a collection district, together with a description and valuation of their property, made periodically, with a view to equality and uniformity in the levy of taxes. It is variously called tax list, rate bill, assessment roll, according to the laws and usages of the respective States.¹

§ 127. **The Levy of the Tax.**—The levy of a specific sum of money upon each tract of land embraced in the list, by the proper authorities, is another essential link in the chain of a tax title, without which the purchaser acquires no rights whatever.²

§ 128. **The Authority to Collect—The Collecting Officer's Warrant.**—The authority to collect a tax is a separate and distinct thing from the authority to sell land, in case the owner proves delinquent, although the same officer generally exercises both powers. When the lands in a collection district have been duly listed and valued, and the tax due upon each tract has been assessed, a list of such lands is placed in the hands of the collector, whose duty it is to proceed, after a day named, to demand the tax of each resident owner, and in case of the neglect or refusal of such owner to pay, to seize the goods or imprison the body of the delinquent, in satisfaction of the tax; and in the event that neither the body nor goods and chattels can be found, it is made the duty of the collector, either to return a list of the delinquents to some other officer, or proceed himself in conformity with the law to make sale of the lands upon which the taxes are delinquent. This authority

¹Graves v. Bruen, 11 Ill. 431; Tibbetts v. Job, Ibid. 453; Schuyler v. Hull, Ibid. 462; Job v. Tibbetts, 5 Gilm. (Ill.) 376; Nalle v. Fenwick, 4 Rand. (Va.) 591; Kinney v. Beverly, 2 Hen. & Mun. (Va.) 318; Lessee of Holt's Heirs v. Hemphill's Heirs, 3 Hammond (Ohio), 232; 1-4 Ohio Cond. R. 551; Lessee of Dresback v. McArthur, 6 & 7 Ohio, 307; Thurston v. Little, 3 Mass. 429; Games v. Stiles, 14 Pet. (U. S.) 322; Adam v. Litchfield, 10 Conn. 127; Whittlesey v. Clinton, 14 Ibid. 72.

²Lisbon v. Bathe, 21 N. H. 319; Norris v. Russell, 5 Calif. 249; Litchfield v. Vernon, 41 N. Y. 123; Allen v. Peoria, etc., Ry. Co. 44 Ill. 85; Stetson v. Kempton, 13 Mass. 272; Dailey v. Swope, 47 Miss. 367; Columbia v. Guest, 1 Head (Tenn.), 413; Cruikshanks v. Charleston, 1 McCord (N. C.), 360; Simmons v. Wilson, 66 N. C. 336; Vanover v. Justices, 27 Ga. 354; Lott v. Ross, 38 Ala. 156; Richmond v. Daniel, 14 Grat. 385; Bullock v. Curry, 2 Met. (Ky.) 171; Bright v. McCullough, 27 Ind. 223.

is variously denominated the tax list, duplicate, invoice or collector's warrant, according to the peculiar legislation or usage of the different States.¹

It may be said that a copy of the list, duplicate, invoice, or warrant to collect, is analogous to an execution, and constitutes the only authority of the officer to proceed and collect the tax, by a demand, or seizure of the body or goods, in case payment is not made of the tax charged.² Without a legal document of this nature, delivered by the officer of the law designated for that purpose, the collector has no authority to proceed to enforce payment of the taxes. His demand, seizure of the body or goods, his return, and all of his other acts will be nullities, and lay no foundation for the sale of the land by the officer intrusted by law with their duty. It must not only be made and delivered by the proper officer but it must be delivered to the collector *de jure* or *de facto*, and not in the hands of a mere usurper or intruder into the office.³

§ 129. **Demand of the Tax.**—The mere assessment of a tax upon land does not create a debt against the owner. It can not be garnisheed, attached or seized in execution at the suit of a creditor of a municipal corporation.⁴ Nor is it a judgment or contract which may be set off against the claim of a creditor of a city. It may be laid down as a universal rule in the collection of a tax assessed upon the land of resident owners, that the person or personal estate of the delinquent is the primary fund out of which the tax must be made. A sale of the land itself is a dernier resort. The tax is never so far regarded as a debt, in order to charge the body or goods of the

¹ Cooley on Taxation, 298; Blackwell on Tax Titles, 199.

² Pentland v. Stewart, 4 Dev. & B. (N. C.) 386.

³ Hannell v. Smith, 15 Ohio, 134; Holt's Heirs v. Hemphill, 3 Ham. (Ohio) 232; State v. Woodside, 8 Ired. (N. C.) 104; Barnard v. Graves, 13 Metc. (Mass.) 85; Homer v. Cilley, 14 N. H. 85; Chandler v. Spear, 22 Vt. 388; Dennis v. Shaw, 5 Gilm. (Ill.) 405; Allen v. Scott, 13 Ill. 80; Bassett v. Porter, 4 Cush. (Mass.) 487; Chase v. Sparhawk, 2 Foster (N. H.), 134; Moore v. Alleghany City, 18 Pa. St.

55; Abbott v. Yost, 2 Den. (N. Y.) 86; Dunning v. Roberts, 21 Vt. 441; Sheldon v. Van Buskerk, 2 Comst. (N. Y.) 473; Downer v. Woodbury, 19 Vt. 329; Brackett v. Whidden, 3 N. H. 19; Dillingham v. Snow, 5 Mass. 558; Wheeler v. Anthony, 10 Wend. (N. Y.) 346; Hathaway v. Goodrich, 5 Vt. 65; King v. Whitcomb, 1 Metc. (Mass.) 328; Upton v. Holden, 5 Ibid. 360.

⁴ Egerton v. Third Municipality, 1 La. Ann. 435; Pierce v. City of Boston, 3 Met. (Mass.) 520.

person against whom it was assessed, until a demand has been made upon the owner by the collector.¹

§ 130. **Seizure of Personal Property First.**—Where the person against whom a tax has been legally assessed, neglects or refuses to pay the tax voluntarily, after a notification and demand made by the collector in the manner prescribed by law, the necessities of the State compel a resort to coercive means. In some States the law requires the body of the delinquent to be arrested, and imprisoned in satisfaction of the tax.² In other States the law requires the tax to be collected out of the personal estate of the delinquent, if a sufficiency can be found to satisfy it.³ The person or personal estate of the delinquent is regarded as the primary—the land the dernier resort.

A violation of the order of remedies thus prescribed, in some States, renders the act of the officer illegal. It is the policy of the law to resort to the land itself, only when all other remedies fail to enforce a satisfaction of the tax.⁴

§ 131. **The Return of the Delinquent List.**—In some of the States the power to collect the tax, and the power to sell land in case of non-payment, is vested by law in different officers. When such is the case, the statute usually requires the collector to return a list of delinquents to his superior, in a certain prescribed form, authenticated or verified in a particular manner, and within a limited time. When such is the requirement it is regarded as imperative, and not directory, and an exact compliance is required. This return is the only evidence of delinquency—of the fact that a demand was made, by the collector, upon the person against whom the tax was charged, and that the body of such person could not be found within the district of the collector; or that the delinquent had no goods and chattels within the district out of which the taxes could be made. The return is also the foundation of the authority of the superior, to whom it is required to be made, to sell or order a sale of the land. If the officer to whom the return is made, is the person to whom the power of sale is intrusted, the return constitutes his authority to sell,

¹ Bott v. Pearly, 11 Mass. 169.

² Cooley on Taxation, 301.

³ Bassett v. Porter, 4 Cush. (Mass.)

93; Deggett v. Everett, 19 Me. 373;

Cooley on Taxation, 301.

⁴ Cooley on Taxation, 305, 307; 487; Lathrop v. Ide, 13 Gray (Mass.), Blackwell on Tax Titles, 209.

and if he is directed to issue a warrant or order to some third person to make sale of the lands embraced in the delinquent list, the return is the basis upon which he issues the order or warrant. This return will be void if made prematurely,¹ or if it fails to set forth all or any of the matters which the statute requires to be shown by it.²

§ 132. **The Authority of the Officer to Sell.**—The power of sale does not attach until every prerequisite of the law has been complied with, the regularity of the anterior proceedings being the basis upon which it rests. Those proceedings must be completed and perfected before the authority of the officer to sell the land of the delinquent can be regarded as consummated. The land must have been duly listed, valued and taxed, the assessment roll placed in the hands of the proper officer, with authority to collect the tax, the tax demanded, all collateral remedies for the collection of the tax exhausted, the delinquent list returned, a judgment rendered where judicial proceedings intervene, the necessary precept, warrant or other authority, delivered to the officer intrusted with the power of sale, and a sale advertised in due form of law, before a sale can be made. In a word, every act which can be regarded as a condition precedent to a valid sale, must precede the execution of the power; otherwise, there is no authority to sell, and the whole proceeding will be treated as a nullity.³

§ 133. **Peculiar Legislation of the Different States.**—Whether a special authority, directly commanding a sale of the lands embraced in the delinquent list, is essential, where all of the previous proceedings are regular, depends upon the peculiar legislation of each State. In some instances the officer derives his power of sale from the law itself, which is his war-

¹ Thatcher v. Powell, 6 Wheat. (U.S.) 119; Jones v. McLain, 23 Ark. 429; Scoles v. Alvis, 12 Ala. 617; Trainer v. Russell, 5 Haym. 294; Schaefer v. People, 60 Ill. 179; St. Anthony, etc., Co. v. Greely, 11 Minn. 321; Kelley v. Craig, 5 Ired. (N. C.) 129; Harrington v. Worcester, 6 Allen, 576; Huntington v. Brantly, 33 Miss. 451; Sharp v. Jones, 4 Hill (N. Y.), 92; King v. Ewing, 47 Ind. 246.

² Cooley on Taxation, 308.

³ Cooley on Taxation, 308; Blackwell on Tax Titles, 204; Minor v. Natches, 4 S. & M. (Miss.) 627; Lessee of Holt's Heirs v. Hemphill's Heirs, 3 Ham. (Ohio) 232; S. C., 1-4 Ohio Cond. 551; Bishop v. Lovan, 4 B. Mon. (Ky.) 116; Garrett v. White, 3 Ired. Eq. (N. C.) 131.

rant, commanding him, without the intervention of any other agency, to sell, and fixing the time, place and manner of sale. In others, especially where a judgment is required, a precept or other process is delivered to the officer, which constitutes his authority to sell. In others, a simple copy of the delinquent list, duly authenticated, is delivered to him, and sometimes there is superadded a command or direction to proceed and sell.¹

§ 134. **Where a Judicial Condemnation is Required.**—In some States, the power to sell land for the non-payment of taxes, does not arise until the delinquency of the owner has been judicially ascertained. The character, requisites and effect of these proceedings, vary according to the peculiarities of the local law under which they are carried on.²

§ 135. **The Notice Required.**—The maxim that notice is of the essence of things required to be done is a familiar one. And it is a fundamental rule of law that in all judicial, or *quasi* judicial proceedings, affecting the rights of the citizen, he shall have notice and an opportunity of a hearing before the rendition of any judgment, decree or order against him. He must be warned, and have his day in court. And it is immaterial whether the tribunal exercising authority over his rights proceeds regularly or summarily—according to the due course and process of the common law, or in pursuance of a general or special statute. So strict is the application that where a proceeding of a judicial nature is authorized, and the statute is silent as to notice, the adjudication will be void unless notice is given to the party in interest.³ Where the proceeding is before a special tribunal, exercising a summary authority, contrary to the course of proceeding in the common law courts, the evidence that due notice was given must indisputably appear upon the face of the record, and it must be set forth at large in the

¹ Blackwell on Tax Titles, 204; McCoy v. Tuck, 1 Penn. 499; Hinman v. Pope, 1 Gilm. (Ill.) 131; Lessee of Wilkins v. Huse, 9 Ohio, 154.

² Sharp v. Spier, 4 Hill (N. Y.), 76; Buckwall v. Story, 36 Calif. 67; Kelly v. Medlin, 26 Tex. 48; Stierlin v. Daley, 37 Mo. 483; Glan v. White, 5 Sneed (Tenn.), 475; Cooley on Taxation, 357.

³ Eddy v. The People, 15 Ill. 386; Corliss v. Corliss, 8 Vt. 389; Chase v. Hathaway, 14 Mass. 222; Kinderhook v. Claw, 15 John. 537; Owners v. Mayor, etc., 15 Wend. 374; Brown v. Wheeler, 3 Ala. 287; Cooley on Taxation, 334.

record, so that it may be seen on inspection whether the notice was legal and sufficient.¹

It may be laid down as a general rule that the notice or advertisement of the application for judgment on delinquent lands, and the sale of the same for the non-payment of taxes in the time and manner required by the law, is a prerequisite to the validity of a tax title. The objects of advertising tax sales are to give full notice to the proprietor, and furnish him with every facility for the voluntary payment of the tax, before a resort is had to coercive means. To create competition at the sale, and prevent his entire estate from being sacrificed for a trifling sum compared with its real value, when the sale of a less quantity might have been made if a spirited competition had existed. The longer the notice is published, the wider the circulation of the paper, and the more full the information conveyed in the advertisement, so much greater will be the competition at the sale. Hence it follows that any neglect of the officer, which deprives the owner and bidders of that full information which the law intended to give them, is fatal to the validity of the tax sale.²

The advertisement is an official act, and to be valid must be published by the officer to whom the duty has been assigned, and purport upon its face to be his official act, and be attested by his official signature.

¹ *Rex v. Croke*, 1 Cowper, 26; *Cheat-ham v. Howell*, 6 Yerg. (Tenn.) 311; *Gwin v. Van Zant*, 7 *Ibid.* 143; *Cooley on Taxation*, 334.

² *Washington v. Pratt*, 8 Wheat. (U. S.) 681; *Early v. Doe*, 16 How. (U. S.) 610; *Jenks v. Wright*, Pa. St. 410; *Prindle v. Campbell*, 9 Minn. 212; *Moulton v. Blaisdell*, 24 Me. 283; *Bush v. Davison*, 16 Wend. (N. Y.) 550; *Alexander v. Pitts*, 7 Cush. (Mass.) 503; *Blalock v. Gaddes*, 33 Miss. 452; *Reed v. Morton*, 9 Mo. 878; *Hill v. Mason*, 38 Me. 461; *Cooley on Taxation*, 335; *Parker v. Rule's Lessee*, 9 Cranch (U. S.), 64; *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Garrett v. Wiggins*, 1 Scam. (Ill.) 335; *Fitch v. Pinckard*, 4 *Ibid.* 69; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349;

Pope v. Headen, 5 Ala. 433; *Hughey v. Horrell*, 2 Ham. (Ohio) 232; *Farnum v. Buffum*, 4 Cush. (Mass.) 260; *Nalle v. Fenwick*, 4 Rand. (Va.) 594-5; *Kinney v. Beverly*, 2 Hen. & Munf. (Va.) 318, 344; *Lessee of Holt v. Hemphill*, 3 Ham. (Ohio) 232; 1-4 Ohio Cond. R. 551; *Allen v. Smith*, 1 Leigh. (Va.) 231; *Wister v. Kammerer*, 2 Yeates (Penn.), 100; *Luffborough v. Parker*, 16 S. & R. (Penn.) 351; *Delogny et al. v. Smith et al.*, 3 Lou. 418; *Early v. Doe*, 16 How. (U. S.) 610; *Games v. Stiles*, 14 Pet. (U. S.) 322; *Minor v. Natchez*, 4 S. & M. (Miss.) 602; 10 *Ibid.* 246; *Lafferty's Heirs v. Byers*, 5 Ham. (Ohio) 457; *Thompson v. Gotham*, 9 Ohio, 170; *Lessee of Wilkins' Heirs v. Huse and Swindler*, 10 *Ibid.* 139.

§ 136. **The Sale of the Land.**—The authority of the officer to sell depends upon the regularity of the anterior proceedings, and in most instances, upon a special precept authorizing him to proceed; and where the sale is conducted by the wrong officer or person, or where the proper officer makes the sale before his power attaches in point of time, or where he exercises the power after it has become *functus officio*, the sale is void. The sale must be a public, and not a private one. The object of the law is to secure a fair competition at the biddings. If a secret sale could be sustained, the policy of the legislature would be defeated in this respect. A sale made in violation of the letter or policy of the law, in this particular, is void.¹

§ 137. **Confirmation of the Sale.**—In some States the law requires the confirmation of the sale and conveyance by some court of record. Where such is the requisition it must be complied with, or no title vests in the purchaser. It is a general rule of law, that where the consent of any third person is required to the execution of a private power, that, like every other condition, must be strictly performed. And when the consent of a third person is required to a deed, in order to its validity, it can have no operation until that consent is given.²

§ 138. **The Certificate of Sale.**—When the sale is made the officer executes and delivers to the purchaser a certificate of the sale, which constitutes the evidence of the purchaser's right, and entitles him to a deed, unless the land is redeemed by the owner within the time limited by law for that purpose. This is the case in Ohio, Illinois, Michigan and Missouri, and in some other States. In others, the statute requires the collector, upon the sale of the land, to give the purchaser a deed of warranty, to be lodged in the office of the town clerk where the land lies, to remain unrecorded twelve months, and if the owner shall within some fixed period, pay or tender to the purchaser the purchase money and interest thereon, such deed shall be void, and shall be delivered up to the person pay-

¹ Jenks v. Wright, 61 Pa. St. 410; ² Cooley on Taxation, 360; Black-Cooley on Taxation, 339; Blackwell well on Tax Titles, 417; Sugden on Tax Titles, 312; Hughey v. Horrell, Powers, 263; Hawkins v. Kemp, 32 Ham. (Ohio) 231; Thompson v. East, 410; 10 Vesey, 308; Jackson v. Rogers, 4 Lou. 9; Usher v. Taft, 33 Hill, 5 Wend. (N. Y.) 532. Me. 199.

ing or tendering the money. In other States the officer, immediately upon the receipt of the purchase money, executes and delivers to the purchaser a deed conveying the land to him, vesting an absolute estate in the purchaser on condition that the owner does not redeem the same within the time required by law. The purchaser acquires only a contingent interest in the estate purchased, liable to be defeated in the event of a redemption, and if no redemption is made, an absolute and indefeasible title becomes vested in him.¹

§ 139. **Conditions Subsequent to the Sale.**—We are now to discuss those acts which the law requires to be performed after the sale has been made, in order to vest the estate in the purchaser. These conditions, if looked to in their chronological order, are indeed conditions subsequent; but for the purpose of giving effect to the deed, they are conditions precedent to all intents and purposes, and without showing affirmatively the literal performance of them, the deed is mere waste paper. The statutes of several of the States require either that the ministerial officers of the law, or the purchaser, shall, within a limited time after the sale has taken place, perform certain duties or acts intended for the protection of the former owner, the non-performance of which invalidates the sale. The duties of this character most commonly enjoined upon the officers, are the return of the proceedings anterior to, and at the time of the sale, and the deposit or record of the same; and those imposed upon the purchaser are the filing of a surplus bond, the record of his certificate of purchase, and the giving of a notice to redeem, actual or constructive, to the former owner.²

§ 140. **Redemption.**—The purchaser, whether he acquires an equitable title to the land evidenced by a certificate, or the legal estate by virtue of a deed of conveyance, takes the estate subject to all of the rights of redemption which are reserved by the statute under which the sale was made. It is

¹ McCready v. Sexton, 29 Iowa, 216; People ex rel. Seaman v. Ham-356; Clark v. Thompson, 37 Iowa, mand, 1 Doug. (Mich.) 276; Reed v. 536; Alexander v. Bush, 46 Pa. St. Morton, 9 Mo. 878; Bruce v. Schuy-62; Stephens v. Holmes, 26 Ark. 48; ler, 4 Gil. (Ill.) 221; Silliman v. Frye, Curry v. Fowler, 3 A. K. Marsh. 1 Ibid. 664; Ives v. Lynn, 7 Conn. (Ky.) 504; Tilson v. Thompson, 10 505.

Pick. (Mass.) 359; Blackwell on Tax ² Bush v. Davison, 16 Wend. (N. Titles, 347; Rice v. White, 8 Ohio, Y.) 554; Blackwell on Tax Titles, 348.

title is a conditional one. The sale may have been made and all of the previous proceedings conducted, in strict conformity with the law; and yet a redemption by the owner will defeat his conditional title. He acquires his right to the estate under the same law which confers the privilege of redeeming upon the owner. It is the source of his title, and by it his rights must be determined. If no redemption is effected, the estate becomes absolute in him. On the other hand, if the owner redeems within the time and in the manner prescribed, the interest acquired by the sale is *ipso facto* gone forever.¹

§ 141. **The Deed.**—The tax deed is the instrument by which the officer of the law undertakes to convey the title of the rightful proprietor, to the purchaser at the tax sale. According to the principles of the common law, it is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government, or in deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. It is not the title itself, nor even evidence of it. Its recitals bind no one in the absence of statutory provisions. It creates no estoppel upon the former owner. No presumption arises upon its mere production, that the facts upon which it is based, have any existence. But when it is shown that the ministerial officers of the law have performed every duty which the law imposed upon them—every condition essential in its character—then the tax deed becomes conclusive evidence of title in the grantee, according to its extent and purport.²

§ 142. **Amendments of Proceedings by Ministerial Officers.**—It is a general rule of law that the power to correct an error

¹ *Schenck v. Peary*, 1 Dillon, (U. S.) 267; *Jones v. Collins*, 16 Wis. 594; *Gault's Appeal*, 33 Pa. St. 94; *Dubois v. Hepburn*, 10 Pet. (U. S.) 1; *Corbitt v. Nutt*, 18 Gratt. (Va.) 674; *Moore v. Brown*, 4 McRice v. Nelson, 27 Iowa, 148; *Cooley* on Taxation, Chapter XVI, 363; *Blackwell on Tax Titles*, 490; *Cooper v. Brockway*, 8 Watts (Penn.), 163; *Blight v. Banks*, 6 Mon. (Ky.) 206; *Taylor v. Steele*, 1 A. K. Marsh. (Ky.) 316.

² *Blackwell on Tax Titles*, 430. A tax deed, which upon its face bears evidence of a non-compliance with a substantial requisition of the law, is a nullity. *Lean*, 211 (U. S.); 11 How. (U. S.) 414; *Farrar v. Eastman*, 1 Fairf. (Me.) 191; *Hogins v. Brashears*, 8 Eng. (Ark.) 242.

committed in the progress of a proceeding by an amendment belongs exclusively to courts of justice, and has no application whatever to the proceedings of ministerial officers. The acts of these officers are to be tested by the law which authorizes them. When the act is completed, their power is *functus officio*, and if in the record, return, or other evidence of their acts, they have failed to conform to the requisitions of the law or to state the facts as they actually transpired, the error can not be obviated by an amendment, because their power over the subject is exhausted. By the record, as originally made, their acts must stand or fall.¹ Courts, however, exercise a discretion in these matters and sometimes permit amendments to be made to such proceedings where it can be done without prejudice to the rights of third persons. In permitting such amendments to be made the courts require that there should be something upon the face of the proceedings to show that what is sought by the amendment was originally designed, but omitted by mistake or misprision,² and reasonable to notice to all parties in interest.³

§ 143. **Lands Not Subject to Taxation.**—The fact that the land is subject to taxation, is the basis of the power to sell it, in case the owner proves delinquent. If the sovereign power of taxation has never attached to the land, or, having once legally attached, the land is exempted from the operation of the taxing power, then it can not be sold. A sale under such circumstances is void to all intents and purposes. In all cases, if the person taxed, or the subject-matter of taxation, is not within the jurisdiction of the officer who makes the assessment, all subsequent proceedings by mere ministerial officers, acting under a warrant or other authority to enforce the collection of the tax, are deemed utterly void, the assessment being *coram non judice*. The owner is not bound to enjoin the sale of his land under such circumstances, or resort to his remedy against the officers, but may contest the validity of the sale whenever the purchaser or his grantee attempts to recover the possession, or establish his title to the land.⁴

¹ Means v. Osgood, 7 Greenl. (Me.) 147; Blight v. Banks, 6 Mun. (Ky.) 206; Blight v. Atwell, 7 Mun. (Ky.) 268.

² Lake v. Morse, 11 Ill. 587.

³ O'Connor v. Mullin, 11 Ill. 57, 116.
⁴ Dresback v. McArthur, 6 & 7 Ohio 307; Buckley v. Osburn, 8 Ohio, 180; Coney v. Ownen, 6 Watts (Pa.) 435; Sandford v. DeCamp, 8 Watts (Pa.)

§ 144. **Payment of Taxes Before the Sale.**—The delinquency of the owner is the essential fact upon which the power of sale rests. The authority of the government only extends to those cases where the owner neglects to pay the tax in arrear voluntarily. When this neglect is shown, the coercive remedies of the law may be resorted to, and not before. The law in substance declares that the tax assessed shall constitute a lien upon the land, and if the tax is not paid within a specified time, the officer charged with the duty is authorized to sell. The right to sell is therefore founded on the fact of the non-payment of the tax. If the tax be paid before the sale, the lien of the tax is discharged, and the right to sell no longer exists.¹

§ 145. **Fraudulent Sales.**—The validity of a tax sale depends, not only upon the authority of the officer to sell, but on the fairness of the transaction. Fraud vitiates everything. Contracts, of whatsoever dignity, if tainted with fraud, are void at law and in equity. By it the most solemn proceedings of courts of justice are avoided. Even an act of parliament, conceived in fraud, may be declared a nullity. There is nothing in the nature of tax sales which exempts them from the operation of this general rule. On the contrary, a more rigid scrutiny into their fairness is demanded, because of the gross inadequacy of the price usually paid at these sales, and the great inducements held out for the perpetration of fraud in the conduct of them. Instances have occurred where the collector and purchaser have combined to defraud the owner by a sale and division of the spoil, where the taxes were in fact paid by the owner; and also, where an agent intrusted with funds to pay the taxes, violated his trust, and by a similar arrangement with the purchaser, permitted a sale. These are positive frauds, and, of course, render the sale void.

The most numerous kinds of fraud are those usually denomi-

542; *Bolt v. Pearly*, 11 Mass. 144; *Walton v. Gray*, 29 Iowa, 440; *Mor-*
Nichols v. Walker, Cro. Car. 394; *rison v. Kelly*, 22 Ill. 610; *Johnson*
Perkins v. Proctor, 2 Wils. 382; *v. Scott*, 11 Mich. 232; *Rowland v.*
Thurston v. Martin, 3 Sum. (U. S.) Doty, 1 Har. Ch. (N. J.) 3; *Den v. Ter-*
497; *Rowe v. Blakeslee*, 11 Conn. rell. 3 Hawks, 283; *Jackson v. Morse*,
479; *Dyer v. Bank, etc.*, 14 Ala. 622. 18 Johns. (N. Y.) 441; *Laird v.*
¹ *Bennett v. Hunter*, 9 Wall. (U. S.) Heister, 24 Pa. St. 452; *Dougherty*
326; *Wallace v. Brown*, 22 Ark. 118; *v. Dickey*, 4 W. & S. (Penn.) 146;
Sprague v. Coenan, 30 Wis. 209; *Cooley on Taxation*, 322.

nated constructive; or that class of frauds which may be inferred from the violation of public or private confidence; from the privity of the purchaser with the title sought to be divested, or on account of their being contrary to public policy. Such sales are void, not so much because they are opposed to the letter, as to the spirit, of the revenue laws, and the principles of good faith which the common law exacts in transactions of this nature.¹

§ 146. **Abuse or Excess of Authority by Officers.**—It is a general principle that if, in the execution of an authority conferred by law upon a public officer or private individual, an abuse or excess of the authority occurs, the entire proceedings under the authority are rendered void. It is immaterial whether the authority is derived from the common law or from statutes, or whether the abuse or excess consists of acts of commission or omission. In each instance the act is illegal, but the remedy varies according to the circumstances of each particular case.² The abuse or excess of an authority in fact does not render the entire execution void, but only the illegal part of the transaction. But in this case the courts must be enabled to separate that which was properly done, from that part which there was no authority for doing. The same principle is applied to the execution of all private authorities, and to powers of appointment and revocation growing out of the statute of uses. There an excessive execution of the power does not vitiate and taint the entire act, but only so much as constitutes the excess, provided the excess can be seen and separated. But it seems to be a debatable question whether a court of law will support an execution of the power under such circumstances. While such is the general doctrine relative to the excessive execution of private powers, it is believed that no authority can be found for the applica-

¹ Slater v. Maxwell, 6 Wall. (U. S.) 268, 276; Kerwer v. Allen, 31 Iowa, 578; Cooley on Taxation, 339, 340; Blackwell on Tax Titles, 466; Dudley v. Little, 2 Ohio, 504; Donnell v. Bellas, 11 Pa. St. 341, 351; Jenkins v. Wright, 61 Pa. St. 410. penters' Case, 8 Co. 144; Bagshaw v. Goward, Cro. Jac. 147; Taylor v. Cole, 3 T. R. 292; Winterbourne v. Morgan, 11 East, 395; Auscomb v. Shore, 1 Campb. 283; Messing v. Kemble, 2 Ibid. 115; 1 Wils. 154; 2 W. Bl. 1218; Bac. Abr., Tit. Trespass; 1 Chitty Pl.

² Cooley on Taxation, 344; Blackwell on Tax Titles, 509; Six Car- 185; 11 Am. Ed. 1851; 5 B. & C. 485; 2 Johns. (N. Y.) 191; 10 Ibid. 253, 369.

tion of this principle to a naked statute power where the execution of the power must be held good or bad *in toto*. The authorities abundantly prove that where the officer abuses his authority by selling more land than is necessary to pay the tax, his act is void.¹

§ 147. **The Rule Laid Down by Sugden.**—"Where there is a complete execution, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, and the boundaries between the excess and execution are not distinguishable, it will be bad. If a man, having a power to lease for twenty-one years, lease for forty, that will be good in equity *pro tanto*, because it is a complete execution of the power, and it appears how much he has exceeded it."²

§ 148. **The Law Stated by Cruise.**—There is a material difference, in common law powers, between a naked power or bare authority, and a power coupled with an interest. In the case of a naked power, if it is exceeded in the act done, it is entirely void, but in that of a power coupled with an interest, it is good for so much as is within the power, and void for the rest only.³

§ 149. **By Blackwell.**—The power to sell land for the non-payment of taxes is a naked power. It may be laid down as a general rule, that if a naked power be not pursued, the execution of it is void, both at law and in equity.⁴

§ 150. **Variances Between Different Documents and Records Relating to the Proceedings.**—The validity of a tax title depends upon the regularity of all the proceedings. Each document or record in the series of acts necessary to the consummation of the title, must be legal on its face, and correspond with the preceding one upon which it is based, in all essential particulars. The proceedings are, in one sense, an entirety, and must be consistent throughout. This is

¹ *Mason v. Fearson*, 9 How. (U. S.) 248; *O'Brien v. Coulter*, 2 Blackf. Sec. 2.

(Ind.) 421; *Hutchins v. Doe*, 3 Ind. 528; *McQuestion v. Swope*, 12 Kan. 32; *McQuilkin v. Doe*, 8 Black. 581; *Hardenburgh v. Kidd*, 10 Calif. 402; *Clark v. Courtney*, 5 Pet. (U. S.) 319; *Cooley on Taxation*, 344.

² 1 Sugden on Powers, Ch. 9, § 8.

³ 4 Cruise Dig., Tit. 32, Chap. 13,

Sec. 2.

⁴ Blackwell on Tax Titles, 515; Sugden on Powers, Chap. 1, Sec. 1; *Wal-dron v. McComb*, 1 Hill (N. Y.), 111; *Taylor v. Galloway*, 1 Ham. (Ohio) 232.

requisite, not only with a view to the legal identification of the documents or records, but the power of sale and conveyance in a great measure depends upon such consistency. The assessment is the incipient act in the acquisition of title and all of the subsequent proceedings are based upon it; each act in the series must, therefore, not only conform to the assessment, but correspond with its own immediate antecedent, in everything which is essential to its legal identity. Every material variance between the document or record in question, and those which preceded it in point of time, is fatal to its validity; but trifling errors and omissions in matters of form, which do not affect the power of the officer, nor destroy the identity of the document or record as a part of the entire proceedings, may be disregarded.¹

§ 151. **What Irregularities May Be Waived.**—It is a general rule of law, that where an irregularity of such a character as to affect the power of the officer to sell occurs in any part of the proceedings, and the owner of the land having notice of the fact, is silent, and takes no steps to prevent the sale, but permits it to proceed, or even actually consents to waive the irregularity, a sale under such circumstances will not be recognized in a court of law. The officer derives his authority from the law, and not from the owner. He must obey the law and not the orders of a private individual. When he keeps within the pale of his authority, minor irregularities may be cured, or waived, by the party in interest, without impairing the official character and validity of the proceedings; but the authority itself, or any substantial link in the series of acts which are necessary to establish the existence of the power, can not be supplied or enlarged, so as to give official character and validity to acts not authorized or sanctioned by the plain provisions of the statute.²

Where a statute provided that the collector should advertise the delinquent list three months prior to the sale; the advertisement was first inserted January 4, 1843, announcing that the sale would take place February 1, 1843, and the collector discovering his error, amended the advertisement, by changing the day of sale to April 4; but this was done after the first publication, so that the full three months' notice, required by law, was not, in fact, given. The collector notified the delinquent of the error,

¹ Blackwell on Tax Titles, 461; Pitkin v. Yaw, 13 Ill. 251.

² Scales v. Avis, 12 Ala. 617; Blackwell on Tax Titles, 520.

and the latter consented to it. The court held that the sale was a nullity, and the consent of the owner did not cure the irregularity. *Scales v. Avis*, 12 Ala. 617.

§ 152. **Who May Buy at a Tax Sale—Discussion of the Subject.**—There are a great many cases in which parties standing in peculiar relations to the land, or to the owner or other persons interested therein, are not suffered to acquire a tax title and rely upon it as against other claimants. Some of these relations are very plain and it is quite unnecessary to do more than to name them. A tenant for example, who has covenanted to pay the taxes, can not be allowed to neglect his duty and thus acquire a tax title which will cut off the title of his landlord. Neither can the purchaser in possession under an executory contract be allowed to cut off the rights of his vendor by a like purchase, nor a mortgagor that of his mortgagee. A tax purchase made when such a relation exists is made in wrong, and the law in circumvention of dishonesty will conclusively presume that it was made in the performance of a duty and not in the repudiation of it. But there are other cases which are not so plain. A tenant in common, for example, who finds his interest taxed inseparable with that of his co-tenant may advance plausible reasons why, if he buys the whole land at the tax sale, he should be at liberty to claim title to the whole. His duty is limited to paying the tax on his share only; and if the co-tenant neglects to pay for himself, what right has he to demand that those who happen to have an interest with him in the land shall be excluded from the number who take advantage of his default? The reason usually assigned for not permitting such a purchase is that the sale is based in part upon the purchaser's own default, but it is also true, that in a great proportion of such cases the parties stand to each other in confidential relations; and it may without much violence to the facts be assumed that they do so in all cases. No doubt the rule that precludes them speculating in each others' defaults is grounded in sound policy.¹

¹ *Cooly, J., in Conn., etc. Co., v. 342; Anson v. Anson*, 20 Iowa, 55; *Butte*, 45 Mich. 113; 7 N. W. Rep. *Lloyd v. Lynch*, 28 Pa. St. 419; *Maul* 707 (1881); *Burhans v. Van Zandt, v. Rider*, 51 Pa. St. 317; *Fly v. Mc-* 7 N. Y. 523; *Phelan v. Boyland*, 25 Kinley, 44 Iowa, 68; *Jeffery v. Hursh*, Wis. 679; *Chickering v. Faile*, 38 Ill. 45 Mich. 59.

§ 153. **Title by Tax Deed—When the Defendant May Go Behind it.**—According to the construction in general given to the revenue laws of the different States, a plaintiff in ejectment makes out a *prima facie* case by the production of the judgment, precept, and the official deed for the premises, with proof that the defendant was in the possession of the premises at the time of the commencement of the action. These provisions are in general so clear and positive in their terms that there can be but little difficulty in determining how the defendant, if he can, must establish a title that will enable him to go back of a judgment and sale for taxes and inquire into the regularity of the previous proceedings. He may unquestionably do it by the production of documentary evidence showing that the legal title was vested in him, or the person under whom he claims, on the day of sale. He may likewise show that he, or the person under whom he claims, was in the actual possession of the land at the time of the sale, claiming title thereto; for from such possession and claim will arise the presumption of title, and dispense in the first instance with the production of the title papers. He need not show a title to the whole estate, it is sufficient if he has a substantive legal interest in the land. If the title is not vested in him, he may connect his possession with the title by showing a subsisting tenancy between him and the proprietor. If the title has been obtained from the United States, or of any State, since the sale for taxes, the title deeds should be exhibited. The party in possession, who can show in any of these ways that he has a subsisting, legal interest in the premises, may go behind the judgment and show that any of the material prerequisites of the law have not been complied with. If he succeeds in doing it, the title acquired by the purchaser necessarily fails.¹

In an action of ejectment brought to recover the possession of lands sold for the non-payment of taxes levied to defray the expenses of opening a street and not in obedience to an order of a court of competent jurisdiction to meet some particular liability which has been judicially established, the owner is not estopped from showing, by way of defense, that the petition for the opening presented to the mayor was not signed by the owners of the requisite amount of frontage, and the owner is

¹ Lusk v. Harber, 3 Gil. (Ill.) 160 (1846).

not concluded by the acceptance of the petition by the mayor and his certificate as to its sufficiency and the action of the board of public works thereunder, or by the judgment of the County Court confirming the report of the board of public works.¹

§ 154. **Titles through Administration.**—By the laws of most of the States of our Union the real estate of an intestate is liable to be sold for the payment of debts where there is a deficiency of personal estate. The administrator, by virtue of his general authority, has no right to meddle with the real estate, but derives this special authority from the order of the court, which possesses jurisdiction to direct a sale, upon a proper application, and proof of the deficiency of the personal assets.

This power or trust, when granted or ordered, is not understood to convey any estate to the administrator in the lands of the intestate. He derives simply an authority to sell from the court, and upon the sale makes a conveyance to the purchaser; and the estate passes to the purchaser upon his entry into the land by operation of law, so that he is under the estate of the intestate. As long as an administration legally subsists, or may be legally granted, this power over the land may be exercised, if the land remains in possession of the heirs; and it is not defeated simply by an alienation or disseizin of the heirs. By analogy, also, to other cases of a like nature, at the common law, as, for instance, a power given by a will to executors to sell an estate for payment of debts, it may be true that a descent cast will not toll an entry, for there is a distinction between a right of entry and a mere power. The former is in general barred by a descent cast; but the latter is not.²

§ 155. **Time Within Which the Power Must be Exercised.**—The question recurs whether a power of sale, thus derived under the law, and not from the act of the party, is to be considered as a perpetual lien on the land of which the intestate died seized, and capable of being called into life at any distance of time, and under any circumstances, whatever may be the mesne conveyances, disseizins, or descents, which may have taken place. If it be of such a nature, great public mischiefs

¹ Zeigler v. Hopkins, 117 U. S. 683; ² Story, J., in Ricord v. Williams, Mulligan v. Smith, 59 Cal. 206. 7 Wheat. (U. S.) 114 (1822).

must inevitably occur, and many innocent purchasers, fortified as their possession may be, by length of time, against all interests in the land, may yet be the victims of a secret lien, or power, which could not be foreseen or guarded against, and which may spring upon their titles when the original parties to the transactions are buried in the grave. The principles of justice would seem to require that the law should administer its benefits to those who are vigilant in exercising their rights, and not to those who sleep over them. It is always in the power of creditors to compel an administration to be taken upon an estate by application to a court of probates; and if the next of kin decline the office, it is competent for the court to appoint any other suitable person. So that, if creditors do not choose to act, the loss or injury ought rather to fall on them, than on those who are meritorious purchasers without the means of knowledge to guard them against mistake. A power to sell the estate for payment of debts being created by the law, ought not to be so construed as to work mischiefs against the intent of the law. It ought to be exercised within a reasonable time after the death of the intestate; and gross neglect or delay on the part of the creditors for an unreasonable time, ought to be held to be a waiver or extinguishment of it.¹

§ 156. Administrator's Deeds as Muniments of Title.—In proceedings in probate for the purpose of selling real estate to pay the debts of the deceased owner, great strictness is required. Here jurisdictional inquiries are material at almost every step, and to be inattentive to them, is to be guilty of rash imprudence. The application for letters testamentary, or of administration, the citation of parties in interest, the hearing of the proofs, and the order made thereon, correspond substantially to the complaint, service of process, the issue and the trial, and judgment at law. But here the case at law ends while the case in probate is but scarcely commenced.² What makes these proceedings perilous is, that jurisdiction of the court at this stage of the proceedings, is not sufficient to support the subsequent proceedings tending to divest the title of the heir. At each subsequent stage of the proceedings where

¹Ricord v. Williams, 7 Wheat. (U. S.) 116 (1822). ²Freeman on Void Judicial Sales, § 9.

the interest of the heir is sought to be affected, petitions and citations are usually exacted, and in most courts these matters are treated as jurisdictional in their nature.¹ In many cases the conduct of these proceedings is intrusted to persons without experience in court practice, and often without honesty. The courts in which they are had are treated as courts of inferior jurisdiction, and no presumptions are indulged in their favor. The theory of the law is that these courts have no general authority to dispose of real estate in process of administration; their power of disposition is special and limited, and he who relies upon it must show a state of facts sufficient to call it into being.² What has been said under the head of tax titles and tax deeds as muniments of title, applies in principle to the deeds founded upon sales in probate for the purpose of paying the debts of the deceased owner.

¹ Freeman on Void Judicial Sales, 598; Newcomb v. Smith, 5 Ohio, 448; § 9. Withers v. Paterson, 27 Tex. 499;

² Sandford v. Granger, 12 Barb. Woodruff v. Cook, 2 Edw. Ch. (N. Y.) 392; Hall v. Chapman, 35 Y.), 259; Freeman on Void Judicial Ala. 553; Bompart v. Lucas, 21 Mo. Sales, § 11.

CHAPTER XV.

BOUNDARIES.

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§ 1. **Boundaries—What is a Boundary.**—It may be defined as a delineation of the limits of a parcel of real property—the separation, natural or artificial, which marks the line of division of two contiguous estates.¹ Boundaries are sometimes divided into two classes, natural and artificial.

Illustrations.

A conveyance of land, one side of which is bounded by a public navigable river, passes all the land between high-water mark and the ordinary stage of water; and in determining the quantity conveyed, a survey extending only to the top of the bank is not admissible, without connecting evidence as to the quantity embraced between the top of the bank and the ordinary stage of water. *Hess v. Cheney*, 83 Ala. 251; 3 So. Rep. 791 (1888).

A deed conveying a tract of land partly covered by a mill-pond, and "embracing as far as high-water mark," includes all land overflowed by the pond when up to its high-water boundaries. *Jones v. Parker*, 99 N. C. 18; 5 S. E. Rep. 383 (1888).

A deed described the boundary of the land conveyed as running to a certain creek, and "thence up the creek at high-water line in a northeasterly direction, the bearing is about north, 86 deg. east." The creek ran southwesterly but not at the angle named: *Held*, that the creek being a natural monument, controlled the course, and formed the boundary. Following *Caspar v. Jamison*, 120 Ind. 58; 21 N. E. Rep. 743; *Shepherd v. Nave*, 125 Ind. 226; 25 N. E. Rep. 220 (1890).

Where the testimony as to the location of a boundary line is very conflicting it is proper for the court to determine the boundary according to the evidence of a surveyor who has made an actual survey of the premises. *Harrison v. Rowley* (Ky.), 14 S. W. Rep. 359; Am. Dig. 1891, 487.

In the absence of anything to the contrary, the boundaries of a *rancho* established by the final survey of the United States Surveyor General, approved by the Government, and incorporated into the patent, and followed in establishing a partition of the *rancho*, should be taken as correct. *Breen v. Donnelly*, 74 Cal. 301; 15 Pac. Rep. 845 (1888).

§ 2. **Existence of, a Question of Fact for the Jury.**—The establishment of a boundary line is purely a question of fact to be ascertained from the best obtainable evidence in the case. The general rules of evidence govern as in other cases, and the question is one of fact for the determination of the jury.

Illustrations.

The question being which of two locations, based on designated monuments, is the true one, refusal to instruct that "the highest evidence of location is the original marks or monuments on the ground called for in the

¹ *Hunt's Law of Boundaries*, 1; 2 Am. and Eng. Ency. 495.

return of the surveyor," and, if the monuments testified to by defendant's surveyors are original monuments, this fixes the location, for the reason that it is for the jury to fix the location from all the evidence, is error, as the hypothesis of the point is that the jury had closed this inquiry. *Cross v. Tyrone Min. & Manuf'g Co.*, 121 Pa. St. 387; 15 Atl. Rep. 643 (1888).

In ejectment the last call but one in plaintiff's patent, dated in 1796, was "thence south 106 chains to a stake on the South Carolina boundary line," and the last call, "thence with said line east to the beginning." The State boundary line had been moved since the date of the patent: *Held*, that it was for the jury to determine where the State boundary line was at the date of the patent; that if they could locate it, such line was to govern the other calls, but if it could not be located, the courses and distances given in the patent were to govern. *Redmond v. Stepp*, 100 N. C. 212; 6 S. E. Rep. 727 (1888).

Where the description of land calls for another survey on the west, and for a chestnut tree as its southwest corner, and the adjoining corner of such other tract is described in its survey as being a fixed distance from a third survey lying on the west, it is a question for the jury whether this last point, or a chestnut stump further west, claimed to be the original monument, is the true corner. *Bushey v. South Mountain M. & I. Co.*, 136 Pa. St. 541; 20 Atl. Rep. 549; 26 W. N. C. 543 (1890).

Where the calls of the field-notes of the title papers under which both parties claim begin at the corner of a certain survey, and plaintiff's title papers locate that corner at a rock set in the ground, which is there at the time of trial, but the survey made by order of court shows that this rock is not at the place where the calls in the original survey would place it, the line is not to be determined by the recent survey, nor by the course and distance of the original survey, but it is to be located by the jury where it appears from the evidence to have actually been located originally. *Evans v. Foster*, 79 Tex. 48; 15 S. W. Rep. 170 (1891).

In an action to recover a tract of land lying between a slough and a river, plaintiff claimed title by virtue of a grant which bounded the land granted by the river, and the defendant introduced evidence that the surveyor who surveyed the grant meandered the slough instead of the river: *Held* that, in determining the true boundaries of the grant, the sole question was to ascertain exactly where the surveyor ran his lines, and, if the jury found that he ran the line along the slough, they should find for the defendant. *Allen v. Koepsel*, 77 Tex. 505; 14 S. W. Rep. 151 (1890).

In ejectment for a strip of land, twenty-three feet wide, used by defendant as a street, it appeared that a plat of the land adopted by the court in partition proceedings, and approved by defendant's president and board of trustees, fixed the southern boundary line of plaintiff's land 23 feet south of the center of the street as laid out by defendant. Plaintiff's evidence showed that there had never been a government subdivisional survey of the quarter section embracing the land in dispute, but that the original owners had subdivided it so as to contain 80 acres in the north half and 77.23 acres in the south half—the quarter section not containing the full 160 acres; that the southwest 10 acres of the north 80 acres had been conveyed to plaintiff; and that an ancient dividing fence, forming the southern boundary of plaintiff's land, had been located 23 feet south of the center of the

street, which coincided with a line drawn half-way between the north and south lines of the quarter section: *Held*, that the question as to the location of the true southern boundary of plaintiff's land was for the jury, and that it was improper to charge that the true southern boundary of plaintiff's land was a line equidistant from the north and south lines of the quarter section, though defendant's expert witnesses testified that that was the proper method of locating it. *McKey v. Village of Hyde Park*, 134 U. S. 84; 10 S. Ct. Rep. 512 (1890).

In a controversy as to the boundary between two blocks surveyed in 1794, one west of the other, it appeared that the north lines were run west and east from district and subdistrict lines ten miles apart, but they did not meet, and two trees were marked as corners. It was shown that a line was run south from the western tree in 1794, but no line was run south from the eastern tree. The warrant for each block called for the other as an adjoinder. The eastern tree was admitted to be the common corner of the two blocks north of the two in question: *Held*, that it was for the jury to decide which tree was the common corner, and error to charge that the eastern tree was the corner. *Berry v. Watson*, 122 Pa. St. 210; 15 Atl. Rep. 618 (1888).

The locality of the shore line of a meandered river, at the time of the government survey, is a question of fact, and not a mixed question of law and fact. *Menasha, etc., Co. v. Lawson*, 70 Wis. 600; 36 N. W. Rep. 412 (1888).

Where a grant of a tract of land declares its area to be eleven leagues, and there is nothing to indicate an intent to grant a greater area, and no older surveys are called for, and the "footsteps" of the surveyor are found on a part only of the boundaries of the grant, upon an issue as to the location of one of the lines of such tract, an instruction that any excess over the area granted is immaterial if the jury can fix its boundaries in harmony with the calls of the original survey is erroneous; the effect of such excess in determining the unidentified boundaries, in connection with the other evidence, being a question for the jury. *Scott v. Pettigrew*, 72 Tex. 321; 2 S. W. Rep. 161 (1889).

Where there is involved in a suit the question whether a certain river or a slough is the true boundary of a land grant, and the field-notes of the survey of said grant call for the river, but the courses and distances very nearly correspond to the configuration of the slough, and not to the meanders of the river, and it appears that if the survey were made at a time when the water was high the slough might have been mistaken for the river, and the call for the river might have been the result of a mistake, it is error for the court to withdraw from the jury the question whether said boundary extended to the river or to the slough. *Koepsel v. Allen*, 68 Tex. 446; 4 S. W. Rep. 856 (1887).

§ 3. Evidence of Boundaries in General.—The existence of a boundary may be established by evidence in the same manner and under the same rules as the existence of other matters required to be established in courts of law.

Illustrations.

In an action to recover land, where a branch is admitted to be a boundary, but plaintiff alleges and defendant denies that it formerly ran in the "old bed," but has changed its course so as to sever the land in contro-

versy from the tract owned by him, evidence of declarations of a deceased former owner, made while in possession, or of declarations of a decedent, not shown to have been interested or to have had special knowledge that the "old bed" was the boundary, is inadmissible. *Taylor v. Glenn*, 29 S. C. 292; 7 S. E. Rep. 483 (1888).

Where the location of a disputed boundary line of unfenced and uncultivated land in an action of trespass was dependent on evidence of matters occurring more than forty years past, resting only in the memory of men from seventy to eighty years of age, from which it appeared that a certain road, tree and fence were regarded as monuments of a boundary line, the court properly refused to disturb a verdict for plaintiff. *Becken v. Weeks*, 15 N. Y. Sup. 585; Am. Dig. 1891, 487.

For the purpose of ascertaining the true boundary line, where the description in the deed is ambiguous or repugnant, a commissioner's order laying out a street, containing a description adopted by the surveyor, may be put in evidence for the purpose of reconciling the repugnant clauses in the description, notwithstanding the order is for some reason invalid. *Partidge v. Russell*, 50 Hun, 601; 2 N. Y. Sup. 529; Am. Dig. 1888, 134.

In an action over disputed boundaries in an ancient grant, a witness who, when a boy, had been directed by the agent of the owner of the land in dispute to go with a survey or to mark off the boundaries, may properly testify as to the monuments and courses followed, though the agent was present when the survey was made. *Dugger v. McKesson*, 100 N. C. 1; 6 S. E. Rep. 746 (1888).

In such an action a question to a surveyor as to whether, in laying down old grants, it was customary to give the course of streams accurately, when they were not crossings or *termini*, is admissible, in furnishing an explanation of discrepancies between the description and natural objects.

In such an action, expert testimony is admissible to explain that the marks along the north boundary line were placed on the northeast side of the trees, instead of the south side, probably for the reason that they would be there better protected from the sun.

The field-notes of the surveyors who ran the boundary line for the commissioners appointed by the act of 1789, ceding Washington county to the United States, which are produced from the custody of the son of one of the surveyors, and shown to be in the handwriting of one of them, and verified by actual survey, are sufficiently authenticated to be read in evidence, the original report being shown to have been lost. *Dugger v. McKesson*, 100 N. C. 1; 6 S. E. Rep. 746 (1888).

In an action over disputed boundaries in an ancient grant, bounding at one place "by the Washington county line," evidence of the location of that line by the survey, under the act of 1789, ceding Washington county to the United States, is competent, though the grant was issued before the survey, since the survey was a recognition by the grantor of the line in the grant, and is evidence of reputation of where it lies. *Dugger v. McKesson*, 100 N. C. 1; 6 S. E. Rep. 746 (1888).

Plaintiff claimed that the line between himself and defendant was a certain hedge. The former owner of plaintiff's section testified, at the time he planted the hedge, both the corners of the sections owned by plaintiff and defendant were standing, and he had staked off the line between these

corners and planted the hedge. Another witness testified to having seen a mound and stake several years after the hedge was planted, at the east end of the hedge. There was no direct testimony to contradict this, but defendant relied upon a recent survey which showed a slight discrepancy: *Held*, this evidence sustained the judgment that plaintiff was the owner of the land up to the hedge. *Mills v. Penny*, 74 Iowa, 172; 37 N. W. Rep. 135 (1888).

In an action for trespass on land, defendant, claiming title to the *locus in quo* as within the tideway of H. river, and hence embraced in an ancient charter to it, introduced in evidence a map of that region, dated in 1819, on which appeared a pink line separating an area on the east, colored blue, from an area on the west, colored yellow. The premises in dispute were in the area colored blue. A surveyor testified that the pink line showed the high water mark, the area colored blue being within the tideway. Another surveyor testified that he had made a survey in 1886, and that his high water line was almost identical with that shown by the map of 1819. A witness, who remembered the premises as far back as 1831, testified that high water never reached the premises, but flowed against a natural embankment on the easterly side thereof: *Held*, sufficient evidence to sustain a finding that the premises were not within the tideway. *Scholle v. City of New York*, 53 Hun, 633; 6 N. Y. Sup. 785; Am. Dig. 1899, 410.

In a controversy involving the location of a disputed boundary line, where the question turns on the location of an old and recognized division fence, evidence of the borough regulator, who had run the lines of the lots, is admissible to prove where the dividing line is actually located. *Haupt v. Haupt* (Pa.), 15 Atl. Rep. 700.

A surveyor may be permitted to testify, as an expert, that he found the corners of the land in dispute to be according to the original government survey. *Hockmoth v. Des Grands Champ*, 71 Mich. 520; 39 N. W. Rep. 737 (1888).

In ejectment to recover land claimed by plaintiff to be included in his surveys of swamp and overflowed land, and by defendant as being included in another survey to him, the county surveyor who made all the original surveys, and his successor, testified that the land was in plaintiff's survey, and there was a natural monument still standing at which the surveys were begun. The surveyor employed by defendant commenced at a stake which defendant told him was the section corner, but about which he knew nothing: *Held*, that the evidence warranted a finding for plaintiff. *Burdell v. Taylor* (Cal.), 26 Pac. Rep. 1094; Am. Dig. 1891, 486.

Where defendant in trespass for cutting timber claimed under a deed executed by plaintiff's deceased ancestor, in which the boundaries of the land were ambiguously described, testimony by the grantee therein as to declarations by the grantor at the time, assented to by himself, that the tract in dispute was reserved, is admissible as part of the *res gestæ* to aid the jury in identifying the boundaries described. *Roberts v. Preston*, 100 N. C. 243; 6 S. E. Rep. 574 (1888).

The plaintiff and defendant owned adjacent lots. The latter put a fence on what both supposed to be the line, but it left 5 feet of his lot on the plaintiff's side. Afterward the defendant conveyed to the plaintiff 20 feet off the east end of his lot. *Held*, that the 20 feet are to be measured from

the true line, and that parol evidence is not admissible to show an intent to convey a strip 20 feet wide, lying wholly on the defendant's side of the fence. *Andreu v. Watkins* (Fla.), 7 So. Rep. 876; Am. Dig. 1890, 483.

In an action of ejectment, plaintiff sought to establish the boundary line claimed by him by witnesses who knew it by tradition and observation for many years. Surveyors appointed by the court testified that another line was, in their opinion, the true boundary. *Held*, that the evidence of witnesses who had known the land and been familiar with the boundary for many years, was entitled to more weight than that of the surveyors. *Jones v. Dean* (Ky.), 5 S. W. Rep. 470 (1887).

The lines described in a patent must be located by the court according to the calls of the patent. Witnesses can testify only as to the existence and condition on the ground of what is called for in the writing; and it is error to admit their opinions, speculations, or conjectures as to the location of the lines. *Tognazzini v. Morganti*, 84 Cal. 159; 23 Pac. Rep. 138 (1890).

In an action for the value of timber cut from plaintiffs' land, the complaint alleged that the land was known as the "B. League," and was described in the original grant as commencing at the northwest corner of the E. survey; that such call was a mistake, and was corrected by the original field-notes, which called for the commencement at the northwest corner of the B. survey, which adjoined the E. survey on the north; and that the timber was cut from the boundaries last described. The title referred to the field-notes for a description of the land. *Held*, that such field-notes were properly admitted in evidence to show the location of the land. *Irvin v. Bevil* (Tex.), 16 S. W. Rep. 21; Am. Dig. 1891, 487.

A witness is incompetent to testify to the location of a boundary line, where his only knowledge is derived from the fact that an owner of adjoining land, on the sale of his land to the witness, ran it in the presence of the witness; it not being shown that the adjoining owner was the surveyor who originally located it, nor that he was dead. *Alexander v. Gossett*, 29 S. C., 421; 7 S. E. Rep. 814 (1888).

Acquiescence in a line may be shown by the adjoining land owners having actual possession and cultivating to such line; or, if it run through woods, by the proprietor who established such division line, with the knowledge of the adjoining land proprietor, always clearing up to this line, and with his like knowledge, cutting timber and peeling bark up to this division without the other making any objection to such claim or such acts of ownership, though he was present when such acts were being done. *Gwynn v. Schwartz*, 32 W. Va. 487; 9 S. E. Rep. 880 (1889).

Where no marks are found on the boundaries of a survey, and it can not be located on the ground, evidence of the location of junior surveys which call for the lines of the elder as adjoiners is admissible as showing where the surveyors upon the ground located such lines. *Tyrone Min. & Manuf'g Co. v. Cross*, 128 Pa. St. 636; 18 Atl. Rep. 519; 25 W. N. C. 97 (1889).

A written contract, under which the defendant went into possession of a piece of land, and built a house and made valuable improvements thereon, and under which the land was afterward conveyed to him, may be offered in evidence in an action involving the question of the boundaries of the land conveyed to him, to show that he was the equitable owner of the land, and had authority to make an agreement settling a doubtful line between

it and an adjoining lot. *Helm v. Wilson*, 76 Cal. 476; 18 Pac. Rep. 604 (1888).

Plaintiff claimed a strip of land between what he contended was the north line of defendant's survey, and the south line of B.'s survey. Defendant claimed that his north line and B.'s south line were identical. *Held*, that the field-notes of B.'s survey, calling for defendant's north line as B.'s south line, were admissible to show the true location of the disputed line. *Moore v. Stewart* (Tex.), 7 S. W. Rep. 771 (1888).

§ 4. **Deeds, When Evidence of Boundaries.**—Where there is a dispute as to the boundary of a tract of land contained in a larger grant, a prior deed embracing a part of the land involved is admissible in evidence, whether the defendant is able to connect himself with such deed or not, as tending to shed some light upon the question of the location of the grantee's boundary line from the points named in the deed, and fix the land conveyed by subsequent deeds of other parties, and as explaining what part of a larger tract was conveyed by a prior owner to one person, and what part to another, under whom the defendant claims.¹

§ 5. **Declarations of Deceased Persons in Relation to Boundaries.**—In several States of the Union decisions have been made recognizing the admissibility of declarations of deceased persons even though they were statements of particular facts and in regard to mere private boundaries; but many and perhaps most of them were admissible on other grounds than for the establishment of boundaries, either as parts of the *res gestæ* or declarations of parties in possession. In Massachusetts, where the matter has been much discussed, it is held that to be admissible, such declarations must have been made by persons in possession of land and in the act of pointing out their boundaries. The declaration there derives its force from the fact that it accompanies and qualifies an act and is thus a part of the act.²

It would be impossible to review the vast number of decisions of State courts upon this question. In relation to these Mr. Justice Strong, of the Supreme Court of the United States, said:

"Some things may be deduced from them, which, though not universally recognized, are the conclusions to which, we

¹ *Stumpf v. Osterhage*, 94 Ill. 115 (1879). *Person*, 7 Gray (Mass.), 174; *Doggett v. Shaw*, 5 Met. (Mass.) 223; *Long v.*

² *Ilunnicut v. Peyton*, 102 U. S. 333 (1880); *Bartlett v. Em-Pitzer*, 27 Pa. 333.

think, a great majority of them lead. In questions of private boundary, declarations of particular facts as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons shown to have had knowledge of that whereof they spoke, or persons on the land, or in possession of it when the declarations were made.

"To be evidence they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence."¹

Illustrations.

The declarations of the owner of land concerning its boundaries, made while in the act of pointing them out, and while he was in possession, and before any controversy had arisen, are, after his decease, admissible as part of the *res gestæ*. Partridge v. Russell, 50 Hun, 601; 2 N. Y. S. 529.

Declarations of deceased persons as to the boundaries of their land, though not made on the land, are admissible on an issue between parties not privy in estate to them, where the declarants had means of knowledge as to such boundaries, and no apparent interest to misrepresent. Carpenter and Bingham, JJ., dissenting. Lawrence v. Tennant, 64 N. H. 532; 15 Atl. Rep. 543 (1888).

Where two land owners make the same declarations respecting the boundary between their lands more than thirty years before the trial, and before any controversy has arisen regarding the boundary, and both of them have since died, their declarations are admissible in evidence to prove the boundary. Whitman v. Haywood, 77 Tex. 557; 14 S. W. Rep. 166 (1890).

Declarations made by the owner of land to a purchaser at the time he sold as to the boundary lines thereof, are admissible in evidence against a person claiming title from such purchaser. Austin v. Andrews, 71 Cal. 98; 16 Pac. Rep. 546 (1888).

In ejectment, involving the boundary of lands of coterminous owners, it is error to exclude the declarations of the common grantor, made with the owners of both tracts, as to the location of the line between them. Sharp v. Blankenship, 79 Cal. 411; 21 Pac. Rep. 842 (1889).

Declarations of deceased persons are admissible to prove the original location of a highway. Lawrence v. Tennant, 64 N. H. 532; 15 Atl. Rep. 543 (1888).

§ 6. Government Surveys—Evidence of Boundaries.—

The object of these surveys is, first, if practicable, to find the original corners established by the surveys made by the authority of the government. It is by those lines and corners the government sold and persons purchased the public lands. And when sold, the purchaser, by his patent, acquired title to all of the land embraced within the boundary lines of the

¹Hunnicut v. Peyton, 102 U. S. (12 Otto) 333 (1880).

tract thus purchased. When the lines and corners established can be found and identified, the purchaser acquires title to all the lands embraced within their limits. And it does not matter whether the surveys are accurate, as the boundaries when found must control the notes or plat of the survey. Hence they govern the calls for course, distance, and quantity. The plats and notes of the survey are intended to represent what was done in the field, and must yield to the lines and corners when found.

But when they have become obliterated and can not be found and traced by natural or artificial monuments, they can only be re-located by the field-notes and plats of the original survey. And in doing so, resort must be had to known lines and monuments as the basis on which to survey and find where the original lines and corners were established by the government surveyors.¹

Illustrations.

The only issue in ejectment was as to the dividing line between plaintiff and defendant. A surveyor testified for plaintiff that he went on the land, and sought for the missing quarter section corner, and could not find it, but that the north and south section corners could be easily found without field-notes, and that he established the lost corner by dividing the distance between the two section corners equally; that the line was over a mile long, while the survey called for only a mile; that he discovered a line of blazed trees from the south stake, which were originally line trees, and following this line he set a stake near which, and about the right distance and direction, was the remains of a pine stump, which he considered the bearing tree; and that he found line trees all along the line run by him, and that the line, as claimed by defendant, inclosed the land in dispute, which belonged to plaintiff. *Held*, that a motion to nonsuit plaintiff on the ground of insufficiency of the testimony, was properly denied. *Higgins v. Ragsdale*, 83 Cal. 219; 23 Pac. Rep. 316 (1890).

Where, on a question as to the location of a survey, both parties claimed by lines and corners marked on the ground, the rule that a survey made and returned into the land office and not questioned for more than twenty-one years, is conclusively presumed to have been actually made by the surveyor upon the ground, has no application, and it was prejudicial error to give it as an instruction to the jury.

Nor in such case was the rule applicable that, after the lapse of twenty-one years, there is a presumption that a survey so returned was actually made as returned and located, and that this presumption increases in strength and weight as the years pass by. *Keller v. Over*, 136 Pa. St. 1; 20 Atl. Rep. 25; 26 W. N. C. 247 (1890).

In a controversy concerning the true boundary of a tract of land which

¹ Walker, J., in *Sawyer v. Cox*, 63 Ill. 130 (1872); *McClintock v. Rogers*, 11 Ill. 279.

had been surveyed at different times and by different methods, the rule that marked lines shall control in establishing the boundary does not prevail, unless it is shown that they were made upon the original survey. *Moore v. Whitcomb* (Tex.), 4 S. W. Rep. 373 (1887).

It appeared that a certain road, constituting the dividing line between plaintiffs' and defendants' lands, could not be precisely located by physical evidences on the ground; that the meanders of such road were given by calls for courses and distances in the field-notes of the original, unauthorized survey of defendants' land only, and not in those of the survey of plaintiffs' land, which was made first, but was not shown to have been authorized; that neither of these sets of field-notes called for the other; that a resurvey of plaintiffs' land, upon which their patent was issued, was made subsequent to another survey of defendants' land, and the issue of their patent thereon; and that the meanders of the road, as called for in the respective patents, were irreconcilable. *Held*, that the original survey of defendants' land was superseded by that upon which their patent was issued, and that the latter will prevail over that of plaintiffs' junior patent. *Griffith v. Rife*, 72 Tex. 185; 12 S. W. Rep. 168 (1889).

The northwest corner of a survey was plainly marked, and part of the west line was also marked. The rest of the survey had apparently not been run on the ground, but the southeast corner was ascertainable from the field-notes, being located on an established line of another survey, and at a given distance from an established point. The lines of survey as called for in the field-notes were correct as to courses, but were too short to reach from one of said corners to the other. *Held*, that the survey included all the land between the corners bounded by the lines as extended so as to reach from one corner to the other. *Randall v. Gill*, 77 Tex. 371; 14 S. W. Rep. 134 (1890).

The exterior lines of two adjoining interior surveys were undisputed. The boundary line between them had never been surveyed, but its southern end was marked by an oak. North of these surveys were two others. These four surveys were originally returned as being of equal size, and having one common corner. The northern end of the line between these two latter surveys was marked by a sugar-maple, which was not directly opposite the oak, and it was proved that the northern line of these surveys was shorter than the southern line of the others. *Held*, that the boundary line between the two southern surveys should run from the oak parallel to the end lines, and not diagonally from the oak to the maple. *Bloom v. Ferguson*, 128 Pa. St. 362; 18 Atl. Rep. 488; 25 W. N. C. 91 (1889).

A grantor referred to a government corner as a monument in the description of land in a deed, but mistook the location of the government line, which he intended to make the northern boundary of the land conveyed. The land laid off was marked by stakes and other monuments, and was conveyed with reference to such boundaries. *Held*, that the grantee took the land according to the lines actually run and established, though they did not correspond to the line in the government survey. *Fisher v. Bennehoff*, 121 Ill. 426; 13 N. E. Rep. 150 (1887).

The course of the eastern line of the H. tract, as given in the original survey made in 1745, was 14 deg. east. The course of the western line of the B. tract, lying immediately east of the H. tract, as given in the original

survey made in 1813, was 17 deg. and 15 min. east. The western line of the B. tract was made of exactly the same length as the eastern line of the H. tract, and the beginning point of the two lines was the same. The difference in the course of the two lines could be satisfactorily explained by the change in the position of the magnetic needle which had taken place in the time intervening between 1745 and 1813. *Held*, that the two lines must be considered as coincident. *Scott v. Yard*, 46 N. J. Eq. 79; 18 Atl. Rep. 359 (1889).

The boundaries of a survey may be located by surrounding surveys referred to in its field-notes, though its corners and lines can not be found on the ground, and though there is a discrepancy in its area between the field-notes and its boundaries as so located. *Longoria v. Shaffer*, 77 Tex. 547; 14 S. W. Rep. 160 (1890).

§ 7. **Private Surveys.**—Private surveys and surveys made by official surveyors under statutes where such officers exist, are of course evidence of the location and existence of monuments and boundary lines. They are not conclusive, however, and may be reviewed by all courts in cases where their correctness is called in question. But the report of a commission of surveyors appointed, under a statute providing for such appointment, to establish lost or disputed corners and lines, where confirmed by the court making the appointment, is final and conclusive upon the parties to the proceedings and their privies.¹

In trespass to try title to land, the record of a survey by the county surveyor, though it was not legally made, is competent evidence as tending to show the location of the line in dispute. *Holliday v. Maddox*, 39 Kan. 359; 18 Pac. Rep. 299 (1888).

The monuments or marks of the surveyor on the ground determine the true survey as against calls for adjoiners or courses and distances as returned; but, each block of surveys being separate and complete of itself, the call of a tract in one block for an adjoinder in another does not make the monument of the adjoinder the monument of the later block. *Grier v. Pennsylvania Coal Co.*, 128 Pa. St. 79; 18 Atl. Rep. 480; 25 W. N. C. 85 (1889).

Where defendant, after a denial of his motion to non-suit plaintiff on the ground that plaintiff had not shown that the corner between plaintiff and defendant was lost, and that the field-notes used by plaintiff's surveyor were not copies of any official survey or record, introduces a properly certified copy of the original field-notes, which are found to correspond with those used by plaintiff's surveyor, he thereby removes or waives the alleged ground of non-suit. *Higgins v. Ragsdale*, 83 Cal. 219; 23 Pac. Rep. 316 (1890).

On an issue as to the location of a true boundary of a given survey, one who assisted in the survey is competent to testify as to how it was made, so as to enable the court to trace the course of the surveyor; such evidence not contradicting the original field-notes of the survey. *Smith v. Leach*, 70 Tex. 493; 7 S. W. Rep. 767 (1888).

¹ *Ellis v. Wham*, 91 Ill. 77.

Where field-notes in a bond for title did not definitely cover the land conveyed, but it appeared that the grantor had no other land in the same county on a certain creek, and the surveyor on trial identified the land as described by calls, and the court based its finding, as to the identity of the land, on other evidence, an objection to such evidence and finding, without pointing out the reasons, will not be considered. *Sickels v. Epps* (Tex.), 8 S. W. Rep. 124 (1888).

In an action to determine the title to land of which the boundaries are in dispute, it is error to permit surveyors to give their opinion to the effect that, when the land was originally surveyed, only one line of the survey was actually run. *Randall v. Gill*, 77 Tex. 371; 14 S. W. Rep. 184 (1890).

Where the testimony as to the location of a boundary line is very conflicting, it is proper for the court to determine the boundary according to the evidence of a surveyor who has made an actual survey of the premises. *Harrison v. Rowley* (Ky.), 14 S. W. Rep. 359 (1891).

In an action to enjoin defendants from mining on plaintiff's land, the testimony of surveyors appointed by the court for the purpose of determining the line between the lots of plaintiff and defendants, that they had made a careful survey, commencing at a recognized point at a considerable distance from the lots in dispute, and had run the line with a transit, being guided, as far as possible, by ancient landmarks, and by this survey had found that the shaft in dispute was on plaintiff's land, and proof of other surveys, with the same result, warrant a verdict for plaintiff, though there is evidence of other surveys by which the shaft was thrown on defendant's lot. *Christian v. Wahl*, 83 Ga. 395; 10 S. E. Rep. 220 (1889).

In an action for the conversion of a quantity of hay, each party claimed it as having been cut on his own land. A surveyor who had run the lines between the land of plaintiff and defendant testified that the hay was cut upon the land of plaintiff. The defendant testified that the hay was cut on his own land: *Held*, that the testimony of the surveyor was of greater weight than that of defendant. *Herford v. Schulte*, 37 Minn. 389; 34 N. W. Rep. 740 (1887).

§ 8. Lines Differently Located by Different Surveyors.—It not unfrequently happens in actions of ejectment that controversies arise as to the location of boundary lines, the line having been differently located by different surveyors. In these cases the true location of the line is to be determined by the court or jury as a question of fact and in like manner as other questions of fact.¹

Where two surveyors disagree as to the location of a boundary line, the verdict finding the line as located by one will not be disturbed, although from the evidence the location of the line by the other surveyor was the more likely to be correct. *Loveridge v. Omodt*, 48 Minn. 135; N. W. Rep. 564.

§ 9. Descriptions in Conveyances as Boundaries.—Since the enactment of the English statute of frauds requiring all con-

¹ *Herpel v. Malone*, 56 Mich. 199; 22 N. W. Rep. 283 (1885); *Baker v. McArthur*, 54 Mich. 139; 19 N. W. Rep. 923 (1884).

veyances of lands to be in writing, we naturally look for boundaries in the description of the lands conveyed. In the discussion of muniments of title we have seen that every conveyance must contain a sufficiently accurate description of the lands in order that it may be identified and its location definitely ascertained. The description referred to is generally though not always given in lines, courses and distances; that is especially the case in the older States; but where the government survey exists descriptions are generally made by reference to sections and subdivisions. In towns and cities, real property is generally described as lots and blocks by reference to plats and records.

§ 10. Certainty of Descriptions.—As a general rule of law parol evidence is not admissible to supply the deficiencies in the description appearing upon the face of the instrument of conveyance, but when the description is certain as far as it goes and there are two or more parcels of land to which it will equally apply, parol evidence is admissible to show which parcel is intended to pass by the conveyance.¹ A description which is hopelessly uncertain renders the conveyance void and no title passes.²

Testimony of declarations of a grantor, before the execution of a deed, tending to establish a boundary other than that made by the deed as construed by the court on appeal, is inadmissible, as its effect would be to convey land by parol in contravention of the statute of frauds. *Harris v. Oakley*, 54 Hun, 635; 7 N. Y. Sup. 232 (1889).

§ 11. Descriptions Other Than by Metes and Bounds.—It is a sound and reasonable rule that whenever land is occupied and improved by buildings or other structures designed for a particular purpose, which comprehends its practical, beneficial use and enjoyment, it is aptly designated and conveyed by a term which describes the purpose to which it is thus appropriated.³

¹ *Putnam v. Bond*, 100 Mass. 58; *Ewing v. Burnett*, 11 Pet. (U. S.) 54; *Cole v. Lake Co.*, 54 N. H. 278; *Hannum v. West Chester*, 70 Pa. St. 372; *Liffett v. Kelly*, 46 Vt. 516; *Hildebrand v. Fogle*, 20 Ohio, 147; *Morrison v. Wilson*, 30 Calif. 347; *Hoffman v. Riehl*, 27 Mo. 554; *Doe v. Martin*, 4 T. R. 65; *Burton v. Dawes*, 10 C. B. 261; 19 L. J. C. B. 302. ² *United States v. King*, 3 How. (U. S.) 773; *Presbrey v. Presbrey*, 13 Allen (Mass.), 283; *Baily v. White*, 41 N. H. 337; *Shackleford v. Baily*, 35 Ill. 391; *Campbell v. Johnson*, 44 Mo. 247; *Walters v. Breden*, 70 Pa. St. 238. ³ *Johnson v. Rayner*, 6 Gray (72 Mass.), 110 (1856); 3 Washburn on Real Property, 336.

The terms "house," "barn," "mill," "cottage," "town pond" or "wharf," are familiar instances of conveyance of lands by general terms of description, applicable only to the purpose for which the land is used at the time of the grant.¹

Sir Edward Coke laid down the rule that "*stagnum*," in English a pool, doth consist of water and land, and therefore by the name of *stagnum*, or a pool, the water and land shall pass also,"² and so the law has remained to this day.³

A description of land in a deed as "the Sellars Tract" is not too vague to admit of evidence *aliunde* of its location, for the purpose of establishing a corner. *Euliss v. McAdams* (N. C.), 13 S. E. Rep. 162 (1891).

A deed of "one-eighth of the undivided 141½ acres of land known as the 'Old John Whitenek Farm,' in Waltz township, Wabash county, State of Indiana, to-wit, reserve No 4, section 31, township 26 north, of range 7 and 6," is not void for uncertainty of description where it appears that there was a tract of 141½ acres in said reserve known as the "Old John Whitenek Farm," in which the grantor owned an undivided one-eighth interest. *Trentman v. Neff*, 124 Ind. 503; 24 N. E. Rep. 895.

A description as "All that certain plot of land (being about 100x150 feet) situated in said town of Lone Oak, and certain buildings situated thereon,

¹ 4 Cruise Dig. (Greenl. Ed.) Tit. 32, C. 21, § 40, note; *Forbush v. Lombard*, 13 Met. (Mass.) 109; *Blake v. Clark*, 6 Greenl. (Me.) 436; *Whitney v. Olney*, 3 Mason (U. S. C. C.) 280; *Wooley v. Groton*, 2 Cush. (Mass.) 305. The grant of a "mill site" or a "mill privilege" carries the land itself with the use of the water and appendages belonging to the mill; *Brace v. Yale*, 4 Allen (Mass.), 393; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *Moore v. Fletcher*, 16 Me. 63; *Crosby v. Bradbury*, 20 Me. 61; 3 Washburn on Real Property, 336. The grant of a "house" passes the land on which it stands: *Shep. Touchstone*, 90. The grant of a "rope walk" will convey such of the grantor's land as is actually used with it: *Davis v. Handy*, 37 N. H. 65. A grant of a "dwelling house" and "outbuildings belonging thereto," carries with it the land upon which they stand: *Woodman v. Smith*, 53 Me. 81. The grant of "a well" carries the land which it occupies. The term

"well" aptly designates the soil covered by and used with it. It is artificial excavation and erection in and upon land which necessarily, from its nature and the mode of its use, includes and comprehends the substantial occupation and beneficial enjoyment of the whole premises on which it is situated. *Johnson v. Rayner*, 6 Gray (Mass.), 107.

² Coke on Littleton, 5.

³ Upon a town plat there appeared a triangular tract of land, with its base of about 400 feet upon a lake. Nearly parallel to the lake shore, and about 100 feet distant southerly, the plat showed an alley or passageway of thirty feet in width over the tract in question. On the plat, upon that part of the tract south of the alley or way, appeared the words "Eagle Park." *Held*, that the entire tract of ground must be considered as a whole, and as constituting "Eagle Park." *Middleton v. Wharton*, 41 Minn. 266; 43 N. W. Rep. 4 (1889).

same being used as a flouring, corn mill, and cotton-gin, and all fixtures and tools pertaining thereto," is sufficient, where it appears that it is "the only mill-house or gin there was in Lone Oak at that time." *Harkey v. Cain*, 69 Tex. 146; 6 S. W. Rep. 637 (1888).

A deed, after reciting that it was made at Fish river, in the province of West Florida, described the land as "a certain tract of land being and lying at aforesaid place of Fish river, province aforesaid, commonly known as 'Ward's Old Place,' beginning at a creek which empties itself into the said Fish river, and known by the name of 'Alligator creek;' thence south to a rock fronting on the bay of Mobile, calculating in said tract a superficies of 1,000 acres or thereabouts." *Held*, that the description was not so indefinite and uncertain as to exclude evidence of extrinsic facts to identify the land. *Dorgan v. Weeks*, 86 Ala. 329; 5 So. Rep. 581.

A description as follows: "200 acres of the Chas L. Harrison one-third league survey, on Wichita river, in Wichita county, Tex., to be run off by the surveyor of said county, fronting 475 varas on the river and back for complement of 200 acres to be taken out of my half of said survey, and begin at the upper or lower corner, and run with the upper or lower line of my survey for complement. Field-notes to be attached to this deed by said surveyor, and become a part of this instrument," sufficiently identifies the interest conveyed. *Nye v. Moody*, 70 Tex. 434; 8 S. W. Rep. 606 (1888).

A conveyance describing the land by lots, blocks, or government subdivisions, and adding at the end of the description, "also, together with all other lands that may not have been heretofore described belonging to said" grantor, passes title to a lot not expressly mentioned. *Clifton Heights Land Co. v. Randell* (Iowa), 47 N. W. Rep. 905; Am. Dig. 1891, 1248.

A tax deed, describing the land as "3,788 acres of the Martin Flores league," is void for insufficiency of description. *Tram Lumber Co. v. Hancock*, 70 Tex. 312; 7 S. W. Rep. 724 (1888).

§ 12. **A Rule of Construction.**—A conveyance of real estate will not be declared void for uncertainty of description when it is possible by any reasonable rules of construction to determine from the instrument what property it was intended to convey.¹ A rational intention must be sought for, and the construction must be consistent with reason and common sense,² and when the language of the instrument admits of different constructions, each equally reasonable, the construction most favorable to the grantee or person taking the estate, must prevail. This rule is founded upon the reason that by the instrument it is assumed to have been the intention of the grantee

¹ *Newson v. Pryor*, 7 Wheat. (U.S.) 7; *Bibb* (Ky.), 502; 6 Am. Dec. 666; *An-Stone v. Stone*, 116 Mass. 279; *Stevens* draws v. *Murphy*, 12 Ga. 431; *Abbott v. Mayor*, etc., 14 J. & S. (N. Y.) 274; *v. Abbott*, 51 Me. 582; 2 Am. & Eng. *Wendell v. Jackson*, 8 Wend. (N. Y.) Ency. 496.
183; 22 Am. Dec. 635; *Kruse v. Will-* ² *Lyman v. Arnold*, 5 Mason (U. S.),
iams, 79 Ill. 233; *Hart v. Hawkins*, 3 198; *Magoon v. Harris*, 46 Vt. 271.

to convey the estate, and it is his default if, by an imperfect description of the premises, it fails to do so.¹

§ 13. **The Time and Circumstances Under Which the Conveyance Was Made, the Surest Mode of Interpretation.**—In ascertaining the boundaries of the property intended to be conveyed, courts often look beyond the instrument of conveyance to the circumstances surrounding the parties and the transaction at the time of its execution. Parties capable of making a conveyance are presumed to make it with reference to the state or condition of the premises at the time, and the true meaning of the language of the description, otherwise ambiguous, may be determined from the relative positions of the parties to the conveyance and of the land.² There is no better way of interpreting ancient words, or of construing ancient grants, deeds, and charters than by usage; and the uniform course of modern authorities fully establishes the rule, that however general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended.³

“Contemporaneous usage,” said Lord Cottenham, “is a strong ground for the interpretation of doubtful words or expressions.”⁴ Where the words of the instrument are ambiguous, courts will call in aid acts done under it as a clue to the intention.⁵

§ 14. **The Elements of the Description Which Control.**—Any description must, as a matter of course, contain certain essential elements which serve as data for the determination of the boundaries or limits of the estate conveyed. These elements are: (1) Enumeration of monuments. (2) Enumeration of courses and distances. (3) Statement of the quantity

¹ *Worthington v. Hyler*, 4 Mass. 205; *bott*, 51 Me. 581; *Pollard v. Maddox*, *Vance v. Fore*, 24 Cal. 446; *Sanborn*, 28 Ala. 325; *Stanley v. Greene*, 12 *v. Clough*, 40 N. H. 320; *Marshall v. Calif.* 148; *Karmuler v. Kratz*, 18 *Niles*, 8 Conn. 469; *Carroll v. Norwood*, Iowa, 356; 2 Am. & Eng. Ency., 497. ³ *Weld v. Hornby*, 7 East, 199; *Rex v. Osborne*, 4 East, 327; *Broom's Legal Ency.* 496. ⁴ *Drummond v. Attorney-General*, 2 H. L. Cas. 861, 863.

² *Broom's Legal Maxims*, 682; *Com. v. Roxbury*, 9 Gray (Mass.), 493; *Connery v. Brooke*, 73 Pa. St. 84; *Richardson v. Palmer*, 38 N. H. 218; *Rider v. Thompson*, 23 Me. 244; *Abbott v. Ab-*

⁵ *Doe v. Ries*, 8 Bing. (31 E. C. L.) 181.

of the land conveyed; their relative value in determining the estate is in the order named. In determining inconsistencies between the different elements of the description in an instrument of conveyance, the courts will give preference to that element or part in which there is the least likelihood of a mistake; hence the monuments will control courses and distances, and courses and distances will control as to the quantity of land stated to be conveyed.¹

An instruction that, in arriving at a boundary line as originally run, natural objects are controlling calls, artificial objects second in importance, course, third, and distance, fourth, and that where there is still uncertainty, that rule should be adopted most consistent with the intent of the grant, is correct. *Lockett v. Scruggs*, 73 Tex. 519; 11 S. W. Rep. 529 (1889).

The statement of the quantity of land supposed to be conveyed, and inserted in deeds by way of description, must not only yield to natural landmarks and marked lines, but also to descriptions in deeds by courses and distances. *Gwynn v. Schwartz*, 32 W. Va. 487; 9 S. E. Rep. 880 (1889).

In the description of lands, as to questions of boundaries, the rule is settled in Virginia and West Virginia that natural land-marks, marked lines, and reputed boundaries will control mere courses and distances, or mistaken descriptions in surveys and conveyances. *Gwynn v. Schwartz*, 32 W. Va. 487; 9 S. E. Rep. 880 (1889).

A complaint was filed to quiet title to 150 acres lying on the south side of a fractional section. A surveyor was ordered to survey that quantity, to be taken the full length of the section from the east side thereof to a river as the western boundary, and extending far enough north to include 150 acres. The surveyor executed the order, and reported a survey, which was accepted, and the court entered judgment, wherein the land was doubly described by inconsistent descriptions. The first described it as in the order of survey, and the second by metes and bounds, by which, after beginning at the southeast corner of the section, and following the south line to the river, it ran up the river, with the meanders thereof, to a stake

¹ *Brown v. Huger*, 21 How. (U. S.) 305; *Chinoweth v. Haskell*, 3 Pet. (U. S.) 96; *Hall v. Davis*, 36 N. H. 569; *Drew v. Swift*, 46 N. Y. 207; *Winans v. Cheney*, 55 Calif. 267; *Wolfe v. Scarborough*, 2 Ohio St. 361; *Kennebec Purchase v. Tiffany*, 1 Me. 219; 10 Am. Dec. 60; *Hoffman v. Riehl*, 27 Mo. 554; *Birmingham v. Anderson*, 48 Pa. St. 253; *Peay v. Briggs*, 2 Mill. (S. C.) 98; 12 Am. Dec. 656; *Fuller v. Carr*, 33 N. J. L. 157; *Clark v. Scammon*, 62 Me. 47; *Wendell v. Jackson*, 8 Wend. (N. Y.) 183; 22 Am. Dec. 635; *Bryan v. Beckley*, Litt. Sel. Cas. (Ky.) 91; 12 Am. Dec. 276; *Grand T.*, etc., Ry. Co. v. *Dyer*, 49 Vt. 74; *Johnston v. Preston*, 9 Neb. 474; *Wender v. Aunt*, 34 Tex. 44; *Dickson v. Wilson*, 82 N. C. 487; *Yates v. Van De Bogart*, 56 N. Y. 526; *Woodward v. Nims*, 130 Mass. 70; *Esty v. Baker*, 50 Me. 311; *Ferris v. Coover*, 10 Calif. 628; *Coburn v. Coxeter*, 51 N. H. 158; *Miller v. Bentley*, 5 Sneed (Tenn.), 671; *Llewellyn v. Earl*, etc., 11 M. & W. 183; *Ufford v. Wilkins*, 33 Iowa, 113; *Mac-kentill v. Savay*, 17 Serg. & R. (Penn.) 164; 2 Am. & Eng. Ency. 499.

placed by said surveyor $19\frac{1}{2}$ chains north of the south line of the section; thence running westerly, parallel with the south line, 53.04 chains, to a stake in the east line of the section; and thence southerly with said line $9\frac{1}{2}$ chains, to the beginning. The stakes were gone, but were shown to have been placed at points $19\frac{1}{2}$ chains from the south line, thereby including 150 acres. Held, that the first description should govern. *Caspar v. Jamison*, 120 Ind. 58; 21 N. E. Rep. 743 (1889).

Where there are several known monuments mentioned in a deed, and they are in conflict with each other, so that the boundary line can not pass through them all, the court must of necessity decide which to retain and which to reject. *Fitzgerald v. Brennan*, 57 Conn. 511; 18 Atl. Rep. 743 (1889).

Where the descriptions in a deed refer to a survey and a map based thereon, making both a part of the deed, and there is a discrepancy between the map and the survey, the latter will prevail. *Whiting v. Gardner*, 80 Cal. 78; 22 Pac. Rep. 71 (1889).

Plaintiffs' survey described the courses as running south a certain distance to the north boundary line of survey No. 138, and east along the northern boundary of No. 138 and No. 132; but according to the distance recited in the survey the west line would fall short of the north boundary of No. 138, leaving a strip of land between it and the south boundary of plaintiffs' survey. The survey of No. 132, made about the same time as plaintiffs' survey, called for the south boundary of plaintiffs' survey as its northern boundary, and other adjoining surveys made about the same time made it appear that such was the boundary line. Held, that the courses and boundaries will prevail as against the distance recited in plaintiffs' survey, making it extend south to the north boundaries of Nos. 138 and 132. *Wyatt v. Foster*, 79 Tex. 413; 15 S. W. Rep. 679 (1891).

When monumental calls in a deed are fully identified, and are sufficient in themselves to show the boundaries, the courses and distances may be entirely disregarded, and this rule is applicable, though it results in an excess of 150 acres in a tract described as containing 240 acres, the excess being mostly covered by water, and of little value when the deed was executed. *McCullough v. Absecon Beach Land & Imp. Co.* (N. J.), 21 Atl. Rep. 481; Am. Dig. 1891, 475.

Where there are well established monuments of a boundary, and the line run from the point of beginning by courses and distances does not conform to one of the natural calls, whereas by starting from the other point all the natural calls are answered, the first course and distance from the point of beginning must give way, especially when by following it the line is taken out in an open valley where there is no apparent reason for its frequent changes of course, but taken the other way it runs along the base of mountains, which render such changes necessary. *Hughes v. Cawthorn*, 35 Fed. Rep. 248 (1888).

Monuments govern courses and distances, and courses govern distances, in a survey; and it is error to instruct the jury that a certain line must stop at the distance given in a description in a deed from the corner from which it was run, when, on any theory of the location of the grant, the length of some line must be increased, and on that of one party (which there was evidence to support) this particular line must be lengthened, or

the course of another changed, in order to reach the monument called for. *Curtis v. Aaronson*, 49 N. J. L. 68; 7 Atl. Rep. 886 (1887).

Though courses and distances are the lowest in dignity and importance of calls employed in grants, yet when the land conveyed can be more certainly identified by running the courses and distances, then the grant should be so determined, and it is error to leave it to the discretion of the jury whether they will so identify the grant or not. *Bighom v. McDowell*, 69 Tex. 100; 7 S. W. Rep. 315 (1888).

Where a patent describes a line as beginning at a corner on a branch and running "up the branch and binding thereon," the line must follow the water-course, and not the courses and distances as found by survey. *Bailey v. McConnell* (Ky.), 14 S. W. Rep. 337 (1890).

A marked line, experimentally located by a surveyor in attempting to divide a tract of land, not mentioned in the deed, and disagreeing with its courses and distances, as well as with a plat therein referred to, will not control the description in the deed. *Kuhns v. Fennell* (Pa.), 15 Atl. Rep. 920 (1888).

Courses and distances must yield to fixed monuments, and where they are inconsistent the monuments called for in the deed are paramount. *Anderson v. McCormick*, 18 Or. 301; 22 Pac. Rep. 1062 (1890).

In an action to settle the boundary line between two adjoining patents, if there are conflicting calls indicating two distinct lines of survey, that actually run by the surveyor will always prevail, provided it can be proved. Upon the same principle the call for a marked line of an older survey will prevail over a call for distance. It is to be presumed that the surveyor identified the line called for by the marks upon the ground, and hence that the mistake occurred in the measurement or the calculation of the distance. But if there be no objects, natural or artificial, to show the line, the presumption does not obtain, and the rule no longer applies. *Duff v. Moore*, 68 Tex. 270; 4 S. W. Rep. 530 (1887).

In ejectment for land claimed by plaintiff under a patent from the United States, the evidence showed that the land in controversy was a strip along the southern part of his grant; that the southern line, as located by a well-known natural monument, which was one of the calls of the survey, included this strip; but that if the southern line was run by course and distance it did not include the strip, which in that case belonged to defendant. *Held*, that the evidence was not sufficient to sustain a judgment for defendant, as the natural monument called for in the survey must prevail over the courses and distances when there is a discrepancy. *Adair v. White* (Cal.), 24 Pac. Rep. 663 (1890).

§ 15. An Exception to the Rule.—The fact that the intention of the parties, when it is apparent upon the face of the instrument, furnishes an exception to the rule stated in the preceding section, when the instrument under consideration furnishes evidence of the fact that the recognition of an ordinarily inferior part of the description as controlling the construction to be given to the conveyance will best give effect to the intention of the parties, such recognition will be

given, and the courses and distances will be allowed to control the monuments.¹ When the intention to convey a certain quantity of land is clearly apparent upon the face of the deed, the quantity will be allowed to control the other elements of the description.²

§ 16. Inconsistent Elements of the Description May Be Disregarded, When.—In cases where parts of the description of the premises sought to be conveyed are inconsistent with other parts, but enough of them are sufficiently certain, under reasonable rules of construction, to locate the property which the parties intended to convey, the repugnant elements of the description will be rejected as surplusage, and the instrument construed to convey the premises falling within the consistent elements of the description.³

The description in a deed for the same property gave the boundary as "beginning at the northeast corner of said lots 6 and 9, thence south to the southeast corner of lot 9, thence west 22½ feet, thence to a point on the north line of lot 6, and thence 22½ feet west of the northeast corner of said lot 6; thence east to the place of beginning." *Held*, that "thence," after the word "and," was an evident mistake of the scrivener, and should be rejected as surplusage, and that the deed conveyed a strip of land 22½ feet wide off the east side of the lots. In descriptions of lands in deeds, that which is false or repugnant will be rejected to effectuate the intention of the grantor. *Holston v. Needles*, 115 Ill. 461 (1886).

§ 17. Mere Erroneous Descriptions do not Render the Conveyance Inoperative.—The general rule of law in this regard may be thus stated. As soon as there is an adequate and

¹ *White v. Luning*, 93 U. S. 515; *Am. Dec.* 635; *Morrow v. Williard*, 30 *Jigginbotham v. Stoddard*, 72 N. Y. Vt. 118; *Abbott v. Abbott*, 53 Me. 94; *Newhall v. Ireson*, 8 Cush. (Mass.) 360; *Scofield v. Lockwood*, 35 Conn. 595; 54 *Am. Dec.* 790; *Hamilton v.* 428; *Bosworth v. Simpson*, 36 N. H. Foster, 45 Me. 32; *Jones v. Bargett*, 91; *Peck v. Mallams*, 10 N. Y. 532; 46 Tex. 484; *Den v. Graham*, 1 Dev. Bass v. Mitchell, 22 Tex. 285; *Tlayer v. Torrey*, 37 N. J. L. 339; *Shewalter v. Pirnea*, 55 Mo. 218; *Anderson v. Boughman*, 7 Mich. 69; *Wade v. Deray*, 50 Calif. 376; *Hathaway v. Juneau*, 15 Wis. 264; *Tubbs v. Gatewood*, 26 Ark. 128; *Raymond v. Coffey*, 5 Oreg. 182; *Llewellyn v. Earl*, etc., 11 M. & W. 183; *Doe v. Ashley*, 10 Q. B. 236; *Dyne v. Nutley*, 14 C. B. 122; *Manning v. Fitzgerald*, 29 L. J. Ex. 24; *White v. Birch*, 35 L. v. Jackson, 8 Wend. (N. Y.) 183; 22 J. Ch. 174.

² *2 Am. & Eng. Ency.* 499; *Kirkland v. Way*, 3 Rich. (S. C.) 4; 45 *Am. Dec.* 752; *Pierce v. Faunce*, 37 Me. 63.

³ *2 Am. & Eng. Ency.* 498; *Parker v. Kane*, 22 How (U. S.) 1; *Presbrey v. Presbrey*, 13 Allen (Mass.), 283; *Dodge v. Walley*, 22 Calif. 224; *Law v. Hemstead*, 10 Conn. 23; *Wendell*

v. Jackson, 8 Wend. (N. Y.) 183; 22 J. Ch. 174.

sufficient definition, with convenient certainty of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it.¹ The description, so far as it is false or erroneous, applies to no subject at all, and so far as it is true applies to one only.² Descriptions in conveyances of real estate will be construed, if possible, so that no part will be rendered inoperative.³ When the obvious intention of the parties to the instrument is that all of the elements of the description are necessary to the identification of estate, the instrument will be ineffectual as a conveyance if no property belonging to the grantor at the time of its execution and delivery can be found corresponding with every element of the description.⁴ Only such lands as are found belonging to the grantor complying with all the particulars of the description will pass by the instrument, although it may appear that it was the intention of the parties that other lands should pass also, but which fall within only a part of the description.⁵

§ 18. **What is an Erroneous Description Within the Rule.**—In determining what is a false description to be rejected in order to give effect to a conveyance of real estate it must be remembered that a particular or expressed description always controls a general or implied description, and it is quite immaterial in what order they appear in the instrument.⁶ But in order to have this effect the particular or expressed description must be certain. If it appears upon the face of the instrument to be in any degree uncertain or obscure, it will be

¹ Llewellyn v. Earl, etc., 11 M. & W. 189; Barton v. Dawes, 10 C. B. (70 E. C. L.) 261; Broom's Legal Maxims, 629.

² Weber v. Stanley, 16 C. B. N. S. (11 E. C. L.), 755; Thomas v. Thomas, 6 T. R. 676.

³ Lane v. Thompson, 43 N. H. 320; Walters v. Breden, 70 Pa. St. 238; Herrick v. Hopkins, 23 Me. 217.

⁴ 2 Am. & Eng. Ency. 497; 3 Washburn on Real Property, 400; Warren v. Goggswell, 10 Gray (Mass.), 76; Brown v. Saltonstall, 3 Me. 423.

⁵ 2 Am. & Eng. Ency. 498; Warren v. Coggswell, 10 Gray (Mass.), 76; Brown v. Saltonstall, 3 Me. 423; Sheppard's Touchstone, 29; Griffiths v. Penson, 1 H. & C. 862; Morrell v. Fisher, 4 Exch. 591; Llewellyn v. Earl, etc., 11 M. & W. 183; Webber v. Stanley, 16 C. B. N. S. 698; Smith v. Ridgway, L. R. 1 Ex. 46, 331.

⁶ 2 Am. & Eng. Ency. 498; Howell v. Saule, 5 Mason (U. S.), 410; Wilson v. Cobot, 18 Pick. (Mass.) 553; Jones v. Smith, 73 N. Y. 205; McEwen v. Lewis, 26 N. J. L. 451; Gans v. Aldridge, 27 Ind. 294.

rejected as false and the general description will prevail.¹ Where different parts of the description are inconsistent, the first part, as a general rule, will prevail over the latter. If the description is partly written and partly printed, and inconsistent, the printed part, under the general rule of construction, must give way to the written, as expressing the true intention of the parties.² And where the essential facts of the description are equally inconsistent, the courts usually allow the person taking the estate to choose that which is most favorable to him.³

§ 19. **Courses and Distances.**—In arriving at the bounds of a survey the courses and distances yield to natural or artificial objects of demarkation,⁴ but where there are no monuments or other evidence will not be permitted to control or vary the courses and distances.⁵ When two descriptive calls are given in a survey, both of equal dignity, as a call for a corner and a marked line, preference will be given to that one which is most consistent with the intention to be derived from the entire description.⁶

Ordinarily, calls for natural or artificial monuments will control courses and distances; but a call for course and distance will not be subordinated to a call for an unmarked line in a prairie, which can not itself be ascertained except by running the boundaries of another survey according to course and distance. *Johnson v. Archibald*, 78 Tex. 96; 14 S. W. Rep. 266 (1890).

Where neither the corners of plaintiffs' nor defendants' land are satisfactorily established, and there is a well-established and identified corner of another survey, from which, by following course and distance, defendants' survey can be constructed, such course should be followed, though the boundaries thus established include land within the boundaries of plaintiffs' junior survey. *Griffith v. Rife*, 72 Tex. 185; 12 S. W. Rep. 168 (1891).

Where a description by metes and bounds is supplemented by a reference to a particular subdivision of land to indicate the tract intended to be conveyed, the former will not necessarily be controlling, when it would leave a strip 13 feet front by 100 deep in the grantor, which clearly appears to have

¹ *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Ela v. Ford*, 2 N. H. 175; 9 Am. Dec. 46; *Barry v. Miller*, 18 Iowa, 460; *Haley v. Amstoy*, 4 Calif. 132. ⁵ *Black v. Pfaff*, 101 Mass. 538; *Blaney v. Rice*, 20 Pick. (Mass.) 62; 32 Am. Dec. 204; *Drew v. Swift*, 46 N. Y. 209; *Bagley v. Morrill*, 46 Vt. 94;

² *McNear v. McComber*, 18 Iowa, 17; *Webb v. Webb*, 29 Ala. 606. *Chadbourne v. Mason*, 48 Me. 391; *Welch v. Phillips*, 1 McCord (S. C.)

³ 2 Am. & Eng. Ency. 499; *Melvin v. Proprietors, &c.*, 8 Met. (Mass.) 27; 82. *Cherry v. Slade*, 3 Murph. (N. C.)

Esty v. Baker, 5 Me. 331. ⁶ *Harrell v. Morris* (Tex.), 5 S. W.

⁴ *Gerald v. Freeman*, 68 Tex. 201; 4 S. W. Rep. 256 (1890). 625; Am. Dig. 1887, 136.

been intended to be conveyed by the latter description. *Cannon v. Emmons*, 44 Minn. 294; 46 N. W. Rep. 356 (1890).

In ejectment for land claimed by plaintiff under a patent from the United States the evidence showed that the land in controversy was a strip along the southern part of his grant; that the southern line, as located by a well-known natural monument, which was one of the calls of the survey, included this strip; but that if the southern line was run by course and distance it did not include the strip, which in that case belonged to defendant. *Held*, that the evidence was not sufficient to sustain a judgment for defendant, as the natural monument called for in the survey must prevail over the courses and distances when there is a discrepancy. *Adair v. White*, 85 Cal. 313; 24 Pac. Rep. 663 (1890).

A natural monument, such as a ditch, will control both courses and distances when there is no question of its actual location. *Greenleaf v. Brooklyn, F. & C. I. Ry. Co.*, 50 Hun, 606; 3 N. Y. Sup. 222 (1889).

Where a patent calls for unmarked lines of surrounding surveys, the position of which can be accurately ascertained, and there is no evidence as to how the survey was actually made, such unmarked lines will prevail over courses and distances, in case of a conflict. *Maddox v. Turner*, 79 Tex. 279; 15 S. W. Rep. 237 (1891).

Where the defendant's title to a certain tract of land depended upon whether the land was included in plaintiff's survey or not, and it appeared that, if the boundaries of plaintiff's land were determined according to the course and distance called for in plaintiff's patent, the tract would not be therein included, while it would if the boundaries were determined according to certain marked corners called for, *held*, that the marked corners called for should be taken as the true corners, and the course of the lines thence run as designated in the field-notes without regard to distance. *McAminch v. Freeman*, 69 Tex. 445; 4 S. W. Rep. 369 (1887).

Plaintiff in ejectment claimed a line different from that laid down in the survey, by reason of the known location of his N. E. corner. Plaintiff testified that a stake was set at this corner by the original surveyor; but this stake only stood two years. Some years after, a surveyor started with the initial point of plaintiff's survey, and running on course and distance found the witness tree of the N. E. corner, and located that corner as laid down in the original survey; and the line so run was treated as the true line by adjoining owners without objection from plaintiff. *Held*, that the evidence in support of the N. E. corner, as claimed by plaintiff, was sufficient to prevail over the courses and distances. *King v. Brigham*, 19 Or. 560; 2 Pac. Rep. 150 (1891).

In arriving at the bounds of a survey, courses and distances yield to natural or artificial objects of demarkation; but the former will not be made subordinate to an unmarked prairie line, which could not itself be ascertained except by running the boundaries of another survey according to course and distance. *Gerald v. Freeman*, 68 Tex. 201; 4 S. W. Rep. 56 (1887).

The owner of a lot in the city of Rochester, of the area of about one-half acre, rectangular in form, fronting 274 feet on a street, and abutting on the rear for the same distance on a canal, the location of both, as well as the other lines, being undisputed, conveyed a portion, by description, of "137 feet front and rear, measuring from G. H.'s north line of G. street, and also 137 feet from G. H.'s south line on the canal; being the piece of land occupied

as a garden by the grantor." The lot was divided by a fence, one side being used as a garden; the fence starting on G. street midway, but striking the back line at the canal at a point $19\frac{1}{2}$ feet from the middle of the lot. The fence was not mentioned in the deed. *Held*, that the reference to the garden was too indefinite to control the calls for exact distances from known bounds, and the divisional point on the canal should be located 137 feet from G. H.'s line. *Harris v. Oakley*, 54 Hun, 635; 7 N. Y. Sup. 232 (1889).

An entry contained a call "beginning at the east corner" of a certain other entry. A subsequent call was "so as to include the head-waters of S.," a certain stream. *Held*, that, it being necessary to begin at the northeast corner in order to include said head-waters, the first call was made special by the second call. *Bleidorn v. Pilot Mountain Coal & Min. Co. (Tenn.)*, 15 S. W. Rep. 737; Am. Dig. 1891, 476.

§ 20. **Government Surveys—Courses, Distances and Quantities Must Yield to Monuments and Marks Erected by the Original Surveyor.**—By this system the public lands are first surveyed into townships, six miles square, the lines of which are required to correspond with the cardinal points. At the corners of the townships, appropriate monuments are required to be erected, between which, all along these lines, other monuments are erected, at intervals of one mile. The townships are subsequently divided into thirty-six sections, by running parallel lines each way, from those intermediate monuments on one side of the township to the corresponding ones on the side opposite. At the corners of the sections, where these lines cross each other, and equidistant between these corners, monuments are also erected. This divides the township into sections and those sections into quarter sections. Only the external lines, however, of the sections are actually run upon the ground by the original surveyor. The lines thus actually run by the surveyor become the true external boundaries of the sections, and, of course, of their subdivisions. Where the boundaries of the subdivisions have not been actually run, they must be ascertained by running true lines from one established point to another. The original monuments, when ascertained, afford the most satisfactory, and, we may say, conclusive evidence of the lines originally run, which are the true boundaries of the tract surveyed, whether they correspond with the plat and field-notes of the surveyor or not. All agree that courses, distances and quantities must always yield to the monuments and marks erected or adopted by the original surveyor, as indicating the lines run by him. These monuments are facts; the field-notes and

plats, indicating courses, distances and quantities, are but descriptions, which serve to assist in ascertaining those facts. Established monuments and marked trees not only serve to show with certainty the lines of their own tracts, but they are also to be resorted to, in connection with the field-notes and other evidence, to fix the original location of a monument or line which has been lost or obliterated by time, accident or design.¹

§ 21. **Boundaries Governed by Calls and Monuments.**—In actions between others than the original parties to a deed, the intention of the parties to the conveyance can not be inquired into for the purpose of ascertaining what was sought to be conveyed, if the calls in the deed refer to fixed monuments or points. Where there is a call in a deed which was in fact not intended by the parties, and is found, and is unambiguous, the intention of the parties can not be made to take the place of the call; for if this could be done, titles and lands would be transferred by the intention of the parties and not by the deed. Effect will be given to the intention of the parties in respect to calls, only when the words of description they employ will admit of it, and are not inconsistent with the intention proved. Further than this a court of law can not go; beyond this is the region of equitable jurisdiction under the head of mistake.²

§ 22. **Boundaries Adjusted by Parol Agreements.**—It is a familiar doctrine of the law, that the title to real estate can not be transferred by parol. It is equally forbidden by the principles of the common law, and the express provisions of the statute of frauds. It is settled, however, that the proprietors of adjoining tracts of land may, by a parol agreement, settle a disputed boundary line between them. Such an adjustment of the boundary, if followed by corresponding possession, may be binding on the parties, not because it passes title, but because it determines the location where the estate of each is supposed to exist.³

¹ Caton, J., in *McClintock v. Crandall*, 34 Cal. 343; *Jackson v. Rogers*, 11 Ill. 295 (1849); *Miller v. Wendell*, 5 Wend. (N. Y.) 146; 1 Buler, 25 Ill. 163; *Tolman v. Race*, 36 Greenl. Ev. § 391.

Ill. 472; *Colvin v. Fell*, 40 Ill. 413.

³ Treat, J., in *Crowell v. Maughs*, 2

² *Gillespie v. Sawyer*, 15 Neb. 298; *Gil. (Ill.)* 423 (1845); *Jackson v. Dys-* 19 N. W. Rep. 449 (1884); *Piercy v. ling*, 2 Caines (N. Y.), 198 (1804); *Kip*

Illustrations.

While it may be regarded as settled that the title to real estate can not be transferred by parol, yet it is a principle well established, that the owners of adjoining tracts of land may, by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession according to the line so agreed upon, is binding and conclusive, not only upon them, but upon their grantees. *Cutler v. Callison*, 72 Ill. 113; *City of Bloomington v. Cemetery*, 126 Ill. 221 (1888).

When the boundary line between the lands owned by adjoining land owners is unknown, they may by parol fix a line between each party, each party mutually agreeing thereto, and acting thereon, which is binding between them; but if the line is known, then the transfer of any portion of the land on one side of the line from the one to the other must be in writing, to be valid. *Jenkins v. Trager*, 40 Fed. Rep. 726.

Disputed boundaries between two adjoining lands may be settled by express oral agreement, executed immediately, and accompanied by possession according thereto. *Gwynn v. Schwartz*, 32 W. Va. 487; 9 S. E. Rep. 880 (1889).

Such an agreement is valid and binding on the parties and their vendees, though they were both mistaken as to the true location of the line. *Harne v. Smith*, 79 Tex. 310; 15 S. W. Rep. 240 (1891).

Where there is a dispute as to the true division line between adjoining proprietors, and they agree on a permanent boundary, and take possession accordingly, the agreement is binding on them, and those claiming under them, and such agreement is not within the statute of frauds. Following *Jacobs v. Moseley*, 91 Mo. 457; 4 S. W. Rep. 135. *Atchison v. Pease*, 96 Mo. 566; 10 S. W. Rep. 159 (1889).

Where an agreement has established a disputed boundary, subsequent conveyances by the parties to the agreement and their privies, by the same descriptions as those under which the title was acquired and possession held prior to the agreement, will pass the title according to the agreed boundary. *Smith v. McCorkle* (Mo.), 16 S. W. Rep. 602; Am. Dig. 1891, 481.

When adjoining land owners have settled the boundary line between their respective tracts with full knowledge as to the true boundary, and have both occupied up to the line as established for more than twenty-one years, they are estopped from disputing the accuracy of the line as established. *Sheetz v. Sweeney* (Ill.), 26 N. E. Rep. 648; Am. Dig. 1891, 482-485.

A boundary line agreed on by heirs while under age, to be ratified by conveyance on their becoming of age, marked with a division fence built by both parties, and soon after repudiated by the heirs on the ground that they had since found out that defendant had no title to the land embraced therein, is not conclusive on a grantee of the heirs. *Wilson v. Hoffman*, 70 Mich. 552; 38 N. W. Rep. 558 (1888).

When a dividing line is established between tracts of land owned by a county, before purchases are made of land on each side of it, and the deeds

v. Norton, 12 Wend. (N. Y.) 127 (1834); *City of Bloomington v. Cemetery*, *Sparhawk v. Bullard*, 1 Met. (Mass.) 95 etc., 126 Ill. 221 (1888); *Boyd's Lessee* (1840); *Cutler v. Callison*, 72 Ill. 113; *v. Graves*, 4 Wheat. (U. S.) 513 (1819).

under which parties claim have been made, and are known by the parties to have been made with reference to that line, they, and all the persons claiming through them, are bound by it. *Briscoe v. Puckett* (Tex.), 12 S. W. Rep. 978; Am. Dig. 1890, 440.

Where adjacent owners are in doubt as to the boundary, and after a survey agree upon a certain line, their agreement is valid, and the line as established by it will be held to be the true one. *Levy v. Maddux* (Tex.), 16 S. W. Rep. 877; Am. Dig. 1891, 481.

But where two adjoining proprietors of land are divided by a fence which they suppose to be the true line, each claiming only to the true line, they are not bound by the supposed line, but must conform to the true line, when ascertained. *Jacobs v. Moseley*, 91 Mo. 457; 4 S. W. Rep. 135 (1888).

And so the mere occupation for ten years by adjoining proprietors under a mistake as to the location of a fence, is not sufficient evidence from which to infer an agreement to hold to said fence regardless of the true line. *Schad v. Sharp*, 95 Mo. 573; 8 S. W. Rep. 549.

A mere license by the owner of one tract of land permitting the owner of an adjacent tract, the boundary line between which and the former tract is disputed, to fence and occupy over the true line, will not amount to an agreement accepting the line claimed by the license as the boundary, though his possession extends up to the line so claimed. *Wright v. Lassiter*, 71 Tex. 640; 10 S. W. Rep. 295 (1889).

In an action to establish a boundary between two conflicting grants, defendants can not introduce in evidence an agreement between plaintiff and the owners of another survey, establishing the boundary between them, when neither defendants nor their vendors were parties to the agreement nor bound by it. *Anderson v. Jackson*, 69 Tex. 346; 6 S. W. Rep. 575 (1888).

This agreement can be shown by acts of acquiescence during the time the respective portions were owned by the original owners, the making improvements by defendant's grantor on the land in dispute, and declarations made after the agreement by plaintiff's grantor while he was still the owner, against his title. *Jones v. Bashby*, 67 Mich. 459; 35 N. W. Rep. 152 (1887).

An agreement fixing a boundary line need not be shown by direct evidence, but may be inferred from conduct, and especially from the long acquiescence. *Jacobs v. Moseley*, 91 Mo. 457; 4 S. W. Rep. 135 (1887).

Such an agreement may be put in evidence in an action of ejectment, as a defense under the general denial. It need not be specially pleaded. *Id.*

The fact that a trespasser built a fence between two tracts of land will not support an implied agreement between the owners to recognize such fence as a boundary line, where the lands are seldom used by such owners. *McKey v. Village of Hyde Park*, 37 Fed. Rep. 389 (1889).

Possession and assertion of ownership under a contract to purchase are sufficient to constitute the occupant an adjoining owner for the purposes of agreed boundary lines, and to enable him to make a valid agreement for such lines. *Silverer v. Hansen*, 77 Cal. 579; 20 Pac. Rep. 136 (1889).

Where the true boundary lines are uncertain, and can be determined only by judicial inquiry, there need be no actual dispute between the parties as a basis for an agreed line. *Id.*

An instruction that no parol agreement in regard to land is good except when there is a dispute between owners of adjoining tracts of land about a

doubtful line, and an agreement upon a division line between them, is erroneous, it not being necessary to the validity of such an agreement that there should be a previous dispute about the line. *Helm v. Wilson*, 76 Cal. 476; 18 Pac. Rep. 604 (1888).

In an action between a daughter, as plaintiff, and the widow of her brother, it appeared that in 1872 the owner of a tract of five acres conveyed to the brother one and one-fourth acres, bounded east and west by vendor's land, and occupied by plaintiff's brother. In 1874 the same vendor conveyed to the father one and one-fourth acres of the same tract, bounded east by land of the son, and west by land of the vendor. This description was erroneous, the true boundaries being the land of a third person on the east, and the son's land on the west. Shortly before the execution of the latter deed, by procurement of the vendor's assignee in bankruptcy, a survey was made of the whole five acres, to run off the same into four equal lots, and adjust dividing lines so as to give one house to each lot; there being then on the original tract four houses. At this survey the son assisted as a chain carrier, and after it was finished, placed a stone to mark the line between his own lot and that of his father, the father as well as himself acquiescing in that line. As it ran west of the son's house, the one now in controversy, it left the house on the father's lot. The son accepted the result, obtained his father's permission to remain in the house, and until his death, in February, 1880, occupied it as the property of his father, disclaiming title in himself, and admitting it in his father. The son's widow remained in the house until this suit, in 1886, without asserting any title to it, so far as appears, until during that year. The father died in 1883, having conveyed the lot to plaintiff. *Held*, that the conventional boundary established on the basis of the survey, the forbearance of the father to take measures to secure anywhere beyond that boundary his due share of the five-acre tract, and the relation of landlord and tenant into which the two entered, are controlling elements of the case, and that plaintiff is entitled to recover. *Glover v. Wright*, 82 Ga. 114; 8 S. E. Rep. 452 (1889).

§ 23. **Boundaries Fixed by Acquiescence.**—Boundary lines are often established by being recognized as such by the parties and acquiesced in for a length of time sufficient to estop the parties from denying their existence; as, for example, where the purchaser of part of a farm, and the owner of the rest of it, cause a line to be run and marked on the ground as the boundary between them, and the purchaser, for more than twenty-one years, occupies and claims the land up to such line, with the other's acquiescence, the line is binding on both parties, their heirs and assigns, though it does not agree exactly with the metes and bounds called for by the purchaser's deeds.¹

Illustrations.

If a corner and a division line are established by a parol agreement between two proprietors of adjoining lands, and are acted upon and ac-

¹ *Culbertson v. Duncan* (Pa.), 13 Atl. Rep. 966; Am. Dig. 1888, 132-133.

quiesced in for a period of time equal to the statute of limitations, they are binding on the parties and those claiming under them. *Valentine, J.*, dissenting. *Sheldon v. Atkinson*, 38 Kan. 14; 16 Pac. Rep. 68 (1888).

Where, a boundary being in dispute, the owners locate a line intending to make it permanent, this line having been acquiesced in for a long time, and recognized by permanent improvements, in the absence of an express agreement as to its being the correct line, is nevertheless binding on the parties and their privies. *Pickett v. Nelson*, 71 Wis. 542; 37 N. W. Rep. 836 (1888).

Long acquiescence by one adjoining proprietor in a boundary established by the other, is evidence of such agreement so fixing the division line between them. *Gwynn v. Schwartz*, 32 W. Va. 487; 9 S. E. Rep. 880 (1889).

For over twenty-five years a fence had stood between plaintiff's and defendant's lots. The owners of the lots had always thought that the fence was in the right place, and on the line. When the fence was originally built, or under what circumstances, did not appear. The only change made in the fence was that eight years prior to defendant's tearing it down a new fence had been built in place of the old, which had, by direction of the then owner of defendant's lot, been placed three inches further thereon than the old fence. *Held*, in ejectment, that the owners of the lots having acquiesced in the line of the old fence for over twenty years, defendant was precluded from asserting that it was not the true line. *O'Donnell v. Penney* (R. I.), 20 Atl. Rep. 305; Am. Dig. 1891, 481.

Where a corner, supposed to have been established by the government in the surveys of public lands has been acquiesced in by adjoining owners of such lands for nearly ten years, and improvements made, and the land broken up to the line thus established, there is a presumption in favor of such corner being the true one, which can only be overcome by clear proof that it was not established by the government. *Coy v. Miller* (Neb.), 47 N. W. Rep. 1046; Am. Dig. 1891, 481.

In an action wherein title is claimed by adverse possession of land bounded by a fence claimed not to be on the true line, it is correct to charge that, if the parties treated and acquiesced in the fence as the true boundary line for a period of fifteen years, then it becomes immaterial where the actual line of the old original survey may have been. *Green v. Anglemire*, 77 Mich. 168; 43 N. W. Rep. 772, 1889.

Where adjoining land owners employ a surveyor to run the boundary line between them, not because they have had a dispute about it, but merely because they are ignorant of its exact location, the line so run, if incorrectly located, is not conclusive on the parties, even though they acquiesce in it believing it to be correct. *Pickett v. Nelson* (Wis.), 47 N. W. Rep. 936; Am. Dig. 1891, 481-483.

Plaintiff conveyed part of a tract of land, separated from his other land by a road. He built a fence along his side of the road, and maintained it for nearly thirty years. He then attempted to move his fence nearer the land sold, claiming that the old fence did not correctly mark the boundary of the road. The evidence was conflicting. *Held*, that the plaintiff was bound by the line as marked by his first fence. *Sherman v. Hastings* (Iowa), 46 N. W. Rep. 1084; Am. Dig. 1891, 433.

Having conveyed certain land to his children, reserving a life interest in

himself, the father entered into an agreement establishing a disputed boundary. On his death the children made another agreement establishing the boundary on the opposite side of the land, and therein they referred to the boundary agreed on by their father as the basis from which measurements were to be made. *Held*, that the reference by the children to the line agreed on by the father, and their subsequent conduct in maintaining the line so agreed on, was a ratification of the boundary established by their father. *Smith v. McCorkle* (Mo.), 16 S. W. Rep. 602; Am. Dig. 1891, 481.

In ascertaining the boundaries of a city lot bordering on a street, the lines of the street as located by the city engineer, and acquiesced in by the city authorities and the public for many years, are to be preferred to those of a more recent survey. *Koenigs v. Jung*, 73 Wis. 178; 40 N. W. Rep. 801, 1889.

Plaintiff, having allowed defendant, who owned the adjoining tract of land, to build a fence between the two, and to occupy, improve, and cultivate the land up to such fence, without any objection, for a period of sixteen or more years, can not contend that such fence is not the true boundary line. *Burris v. Fitch*, 76 Cal. 395; 18 Pac. Rep. 864 (1888).

In ejectment, where the only question is one of boundary, and the boundary line has been established between plaintiff and defendant, where claimed by plaintiff, for over fifty years, and the location acquiesced in by both parties, plaintiff is entitled to recover. *Dale v. Jackson*, 55 Hun, 611; 8 N. Y. Sup. 715 (1890).

Surveys Nos. 323 and 324 were patented to plaintiff's husband. In 1870 his agent employed one B. to survey No. 324, and one W. had him survey No. 323. B. did not find the corners called for in the field-notes, and located the lines by their relation to the lines of other surveys as shown by a land office plat. Soon afterward W. purchased No. 323 by the description given in the patent. When he made the survey in 1870, B. divided No. 324 into lots. The plaintiff's husband conveyed two of the lots "as laid off by B.," and after the conveyance by W. to the intervenor the plaintiff, as her husband's devisee, conveyed other lots by reference to B.'s survey. W. and the intervenor have held possession of the strip in dispute since the purchase by W. *Held*, that it was for the jury to say whether she was bound by acquiescence in the line located by B., and a verdict in her favor should not be disturbed. *Koenigheim v. Sherwood*, 79 Tex. 508; 16 S. W. Rep. 23 (1891).

Where owners of land and their respective grantees, after taking possession of land to a certain line, agreeing to have the true boundary established by survey, allowed the matter to stand thus for several years, the fact of mutual acquiescence prevented the statute of limitations from running against the contract. *Calanchini v. Branstetter*, 84 Cal. 249; 24 Pac. Rep. 149 (1890).

§ 24. **Boundary Lines by Estoppel.**—The doctrine of estoppel is applicable to the establishment of boundary lines; as for example, in an action involving the true location of a boundary line between plaintiff's and defendants' lots, it appeared that before the conveyance to defendants the lots were

surveyed, and it was found that plaintiff's building stood twenty inches beyond the surveyed line, and upon the other lot; that plaintiff refused to buy this narrow strip, but tore down his building, and he and defendants' grantor built a fence on the surveyed line; that after defendants purchased they told plaintiff that they were going to build, and wanted the matter of boundary line thoroughly understood, and would like to build where it would be no inconvenience to plaintiff; that they then spoke of the surveyed line as the dividing line, and plaintiff suggested that defendants build on a place partly included in the disputed strip, which they did. It was held that the plaintiff was estopped from denying that the surveyed line was correct.¹

Plaintiff owned the east half, and defendant the west half of a quarter section. Defendant's grantor had erected a fence on what he claimed was the division line, but plaintiff's grantor objected that it was too far east, and urged a survey, which he finally had made at his own expense. This survey located the division line still further east than the old fence; whereupon he was anxious to have the fence rebuilt, and remain on the old line. This the other finally consented to do, "for the present," and the fence was rebuilt accordingly, and so remained, no further question being made as to the true line, until plaintiff, many years afterward, became dissatisfied with the fence because it was too near his house, and requested defendant to join him in having the line resurveyed. Defendant declining to do so, plaintiff finally ordered a survey on his own account, the result being almost identical with that of the former survey. Defendant proceeded to build a fence on the new line, plaintiff saying, "All right, that is where it should be," and pointing out a post on the line as a starting point. He was present during the progress of the work, pointed out the line, set stakes along it, directed apple trees and shrubbery to be cut down to make room for the fence, set a post on the top of his root house, to avoid making a jog in the fence, and frequently expressed his determination to abide by the survey. *Held*, that the evidence showed that there had been no claim of adverse possession of the strip between the old and new fences, and that plaintiff was estopped to assert that the old fence was the true line. *Fairfield v. Barrette*, 73 Wis. 463; 41 N. W. Rep. 624 (1889).

Plaintiff's father, who conveyed the land to him as a gift, while owner caused the boundary line to be established and permanently marked, and defendant, while the line was so recognized, bought the adjoining tract, relying on such boundary, and made improvements, and occupied the land for many years without adverse claim by plaintiff. *Held*, that the latter was estopped to deny that such line is the true boundary. *Anderson v. Jackson* (Tex.), 13 S. W. Rep. 30; Am. Dig. 1890, 441.

A land owner, under a *bona fide* mistake as to the location of his boundary, cleared and inclosed land beyond the true line, which was marked on the ground, to a more recent marked line, which was thereafter recognized

¹ *Garza v. Brown* (Tex.), 11 S. W. Rep. 920 (1889).

as the true one by him and the adjoining owner for more than twenty years, and also by the latter's heirs, in making partition and in conveyances. He afterward erected a dwelling beyond the original line; but, before doing so, one of the heirs, with knowledge of his purpose to build, ran the line according to that of the inclosure. *Held*, that there was an estoppel to assert the true line, though a survey at any time would have disclosed its location, and though there was no fraud. *Galbraith v. Lunsford*, 3 Pick. (Tenn.) 89; 9 S. W. Rep. 365 (1888).

Where the boundary line fixed by the deeds is ambiguous and confused, a parol agreement fixing a line will operate as an estoppel if acquiesced in, notwithstanding the period of such acquiescence might fall short of the time fixed by the statute of limitations for gaining title by adverse possession. *Jones v. Pashby*, 67 Mich. 459; 35 N. W. Rep. 152 (1887).

But the owners of a strip of land, on the boundary between themselves and defendants, are not estopped from asserting their title, after disputing defendants' right to enter thereon, because, misled by defendants' claim and some advice they had obtained in reference thereto, they acquiesced for less than twenty years in the possession of defendants, who did nothing in reliance on their silence. *Hinkley v. Crouse* (N. Y.), 26 N. E. Rep. 452; Am. Dig. 1891, 482.

And so, where adjoining land owners, whose dividing line is susceptible of exact adjustment, have a survey made, which is afterward discovered to be erroneous, the fact that both parties, having no previous opinion as to the location of the line, express themselves satisfied with the survey, and acquiesce therein for five years, does not estop either of them from insisting on the true boundary. *Sanford v. McDonald*, 58 Hun, 263; 6 N. Y. Sup. 613 (1889).

The owner of a lot inclosed it upon what he supposed to be its boundaries, and then divided it into two parcels, and, reserving an alley-way running east and west through the center of the lot, sold the parcels to different grantees, who went into possession. The north and south boundaries of the original lot, as established by the owner, were by a subsequent survey found to be on both sides a short distance south of the true line. *Held*, though it were shown that the adjoining proprietors, on the north and south, had acquiesced in the boundaries as first established for a time covered by the statute of limitations, that fact could not determine the boundary lines of the owners adjoining the alley, nor estop them, as between themselves, from asserting their true lines. *Suitzgable v. Worseldine*, 15 P. 144, affirmed. *Boreman, J. dissents. Suitzgable v. Worseldine*, 5 Utah, 315; 16 Pac. Rep. 400; Am. Dig. 1888, 133.

A and B, being tenants in common of a section of land, agreed that A should have the south half, and B the north half. A deeded the south-west quarter, and by mistake located the upper boundary too far north. Her grantee deeded it to defendants without any reference to the northern boundary. B deeded the north half to plaintiff, calling for the proper southern boundary. *Held*, that plaintiff was not estopped from claiming the boundary line described in his deed. *Carley v. Parton*, 75 Tex. 98; 12 S. W. Rep. 950 (1890).

§ 25. Boundaries Established by Adverse Possession.—From the nature of adverse possession as a source of title of

real property it follows as a natural sequence that boundary lines may be established by such possession, otherwise the doctrine itself would be of no avail.

Illustrations.

A person purchased land, in his own name, for himself and another, each paying one-half of the purchase money. The two owners established a division line by a survey, fencing with reference to it, and some four or five years after, the one holding the legal title conveyed to the other, intending to convey the half of the tract as shown by the survey, but in fact conveying a small strip more than such half. Such original purchaser occupied his half of the land according to such division line, under claim of ownership, for thirty-six years. It was *held*, that he became the owner of such strip of land under the limitation law. *Schoonmaker v. Doolittle*, 118 Ill. 605 (1886).

The possession of one who makes a fence, intending to put it on the true line, and, believing that he has done so, holds up to it under a claim of right, is adverse, and, if open, actual and continuous for the statutory period, it vests in him absolute title, though before the limitation had run in his favor he had doubts as to his title, or a belief that the strip next the fence did not belong to him. *Hoffman v. White*, 90 Ala. 354; 7 So. Rep. 816 (1890).

Possession taken and held under a claim of right by one of the owners of adjacent lands to an erroneous line agreed on by them under a belief that it is correct is adverse, and, if continued for the statutory period, ripens into a perfect title. *Hoffman v. White*, 90 Ala. 354; 7 So. Rep. 816 (1890).

Where plaintiff claimed by prior possession land bounded partly by fences and partly by a lake and slough, the court instructed the jury that it was sufficient to constitute possession if plaintiff had a substantial inclosure, such as would protect crops, turn cattle, etc., without mentioning the natural barriers. *Held*, that plaintiff was entitled upon specific request to have the jury also instructed as to the effect of such natural barriers. *Goodwin v. McCabe*, 75 Cal. 584; 87 Pac. Rep. 705 (1888).

One of two proprietors of adjacent tracts claimed title beyond the boundary line by adverse possession; his occupancy consisting merely in occasionally cutting and removing timber, and in raising one crop of turnips, without having inclosed any of the parcel in controversy. *Held*, not sufficient to acquire title. *Degman v. Elliott* (Ky.), 8 S. W. Rep. 10; Am. Dig. 1888, 130.

Actual occupancy and possession by an adjoining owner of land beyond the true boundary line for the statutory period will confer title by adverse possession. *Harne v. Smith*, 73 Tex. 310, 15 S. W. Rep. 240 (1891).

Where plaintiff held undisputed possession of land for more than twenty years, claiming under a deed bounding the land by "the High-Bridge road," it appearing that an old survey of the road, which the law required to be filed, located it in a different position from the one in which it actually was, but that this difference was unknown to plaintiff, his possession establishes as the boundary the road as it actually was. *Ausable Co. v. Hargraves*, 16 N. Y. St. Rep. 318; 1 N. Y. Sup. 42 (1888).

Where for more than twenty years a person and his grantors have continu-

ously and uninterruptedly occupied land extending to a fence built by his remote grantor, claiming throughout that it was the dividing line, and using and cultivating such land, under a continuous claim of ownership, he becomes the owner in fee, and ejectment will not lie against him by one having the paper title. *Riggs v. Riley*, 113 Ind. 208; 15 N. E. Rep. 253 (1888).

In an action wherein title is claimed by adverse possession of land bounded by a fence, it is proper to charge that if the required adverse possession is found "it is wholly immaterial how, or by what right or authority, the fence came to be constructed and maintained at the place or along the line where it stood [at the commencement of the suit], if it was by or through an error or mistake." *Green v. Anglemire*, 77 Mich. 168; 43 N. W. Rep. 772.

Where the title to a strip of land is in dispute, and plaintiff's evidence tends to show that such strip is included in the conveyance under which he holds, but his deed describes one boundary of his land as at a certain place, and defendant claims to that place, and gives evidence that a fence has been maintained on that line for more than twenty years continuously, by consent of the adjoining owners, the question of the true location of the line is for the jury, though there is evidence that the fence was once removed for the purpose of clearing out briars where it was located; such temporary removal not being deemed an interruption of the continued evidence of the line. *Hill v. Edie*, 17 N. Y. St. Rep. 255; 1 N. Y. Sup. 480 (1888).

In an action for a strip of land it appeared that the fence between the parties was built more than fifteen years before by plaintiff's vendor, who testified that he built it on the line. Defendant's vendor, who was corroborated throughout, testified that the fence was built on his land with his consent. Defendant, who was also corroborated, testified that plaintiff's vendor had paid rent to him for the strip of land, and that he and plaintiff had agreed on a boundary which gave defendant the strip in question; all which plaintiff denied. *Held*, that defendant should recover. *Rugles v. Fannian* (Ky.), 9 S. W. Rep. 373; Am. Dig. 1888, 136.

The fence inclosing the land in dispute was not all built by plaintiff at one time, and no line was run when he built it; it was commenced on the line, but deviated as it proceeded, and was partially composed of brush and poles. The adjoining land was wild and its owner did not live in its neighborhood, though he occasionally passed that way. There was evidence that during a portion of the time the fence was not in existence. *Held*, that the jury should have been instructed that the land must have been inclosed and held under an assertion of title; that if the fence was temporary, not built with the intention of holding the land, but as an inclosure until the true line could be ascertained, plaintiff could not recover; and the jury might take into consideration how and when the fence was built, and of what materials. *Hockmoth v. Des Grands Champ*, 71 Mich. 520; 39 N. W. Rep. 737.

Evidence that a fence was erected as a boundary line between demandant's lot and another, and existed more than twenty years continuously, being once rebuilt by the owner of the other lot, that the fence was on the line claimed by demandant as a boundary line, and that the demanded premises had been used and occupied by demandant and her grantors "for more than twenty years continuously, openly, adversely, and under a claim of right," shows not only that the line of the fence was the true boundary

line, but that demandant had acquired title up to the line of the fence. *Holloran v. Holloran*, 149 Mass. 298 ; 21 N. E. Rep. 374 (1889).

While in the case of concurrent possession of land under two adjoining surveys, the true location of the line of the elder patent must govern, still the actual possession under a junior patent may ripen into a perfect title, in the absence of such possession and claim under the elder patent. *Swope v. Schafer* (Ky.), 4 S. W. Rep. 300; Am. Dig. 1887, 138.

§ 26. **Boundary Lines Settled by Arbitration.**—Where there is a controversy between adjoining owners as to a division line, and they submit, either in writing or by parol, the matter to arbitrators, and an award is made under the submission declaring a certain line specially set forth in the award as the division line, such submission and award are conclusive upon the parties as to the location of the line.¹ It can not be set aside except for partiality or corruption, and can in no case be collaterally impeached. The party who, according to such line, has in his possession lands belonging to the other, may be compelled to yield up the same by an action of ejectment.² The defendant is concluded by his agreement from disputing the title of the plaintiff.³

§ 27. **Settlement of Boundary Lines in Dispute—A Finality.**—It is not essential that the disputed boundary line be incapable of ascertainment; but if it has been the subject of dispute and contention, and the parties, with the view to settle the dispute, agree upon and settle a line between their land, it is a finality, and can not be disturbed, though they afterward learn that the true line could have been found.⁴

The view is entirely consistent with the principle that where adjoining proprietors, in attempting to find the true line between them, by mistake fixed upon an incorrect one, they may repudiate the spurious line at any time before the statute of limitation has run.⁵

¹*Robertson v. McNiel*, 12 Wend. Johns. (N. Y.) 197; *Jackson v. Gager*, (N. Y.) 578 (1834); *Ward v. Auburn*, 5 Cow. (N. Y.) 383.

etc., 8 N. Y. 160; *Shelton v. Alcox*, 11 Conn. 240; *Carey v. Wilcox*, 6 N. Y. 177; *Bowen v. Cooper*, 7 Watts, 311; *Goodridge v. Dustin*, 5 Met. (Mass.) 363; *Doe v. Prosser*, 3 East, 15; *Baker v. Townsend*, 7 Taunt. 422; *Vosberg v. Teator*, 32 N. Y. 561; *Terry v. Chandler*, 16 N. Y. 354.

²*Robertson v. McNiel*, 12 Wend. (N. Y.) 578; *Sellick v. Addams*, 15

³*Robertson v. McNiel*, 12 Wend. (N. Y.) 578; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Calhoun v. Dunning*, 4 Dall. (U. S.) 120; *Jackson v. Dysling*, 2 Cai. (N. Y.) 198.

⁴*Avery's Lessee v. Baum's Heirs*, Wright (Ohio), 576; *Walker v. Lessee of Devlin*, 2 Ohio St. 593.

⁵*Hills v. Ludwig*, 46 Ohio St. 373; 24 N. E. Rep. 596.

§ 28. **Monuments as Boundaries.**—Monuments, when used to define the limits of an estate, are either natural, which includes all those natural objects which are found on the land in the situation as placed by nature, such as trees, streams of water, beaches and shores, lakes and ponds,¹ or artificial, which are placed by man upon the land for the especial purpose of marking boundaries, as surveyors' stakes, corner stones and the like.²

So long as the monuments erected by the government surveyors can be identified, or the places where they were planted can be known, they must govern in making boundaries. Subsequent surveys may aid in finding such monuments, but the latter must prevail in determining courses and distances. *Jacobs v. Moseley*, 91 Mo. 457; 4 S. W. Rep. 135.

Although it is a fundamental rule that the actual beginning corner must control in locating original surveys, yet when a survey is made upon paper, and not upon the ground, the intentions of the parties making the survey should control, which intention is to be ascertained by all the facts and circumstances connected with the case. *Ocean Beach Ass'n v. Yard* (N. J.), 20 Atl. Rep. 763; Am. Dig. 1891, 477.

A monument, such as a ditch, will control both courses and distances when there is no question of its actual location. *Greenleaf v. Brooklyn F. & C. I. Ry. Co.*, 50 Hun, 606; 3 N. Y. Sup. 222 (1889).

Upon an issue as to the location of a line of the government survey, evidence of the location of monuments is not overcome by field-notes of the original survey, taken at the time of the erection of said monuments or subsequent thereto. *Hubbard v. Dusy*, 80 Cal. 281; 22 Pac. Rep. 214 (1889).

Where it is doubtful which of two lines of monuments is the true government line, other things being equal, that one is to be so considered which most nearly conforms to the field-notes. *Hubbard v. Dusy*, 80 Cal. 281; 22 Pac. Rep. 214 (1889).

As between complicated descriptions of a line dividing two sections or quarter sections, that one is to be adopted which is most in conformity with the monument established by the government survey. *Hubbard v. Dusy*, 80 Cal. 281; 22 Pac. Rep. 214 (1889).

As between different monuments, those best identified should prevail, independent of anything in the field-notes of the original or any subsequent survey. *Hubbard v. Dusy*, 80 Cal. 281; 22 Pac. Rep. 214 (1889).

There being evidence that a corner described in the field-notes with the

¹ *Wheeler v. Spinola*, 54 N. Y. 385; *v. Boothby*, 48 Me. 71; *Humpton v. Hicks v. Coleman*, 25 Calif. 142; *Kirk*, 6 Hun (N. Y.), 257; 84 N. Y. 215; *Hathaway v. Wilson*, 123 Mass. 215; *Arnold v. Elmore*, 16 Wis. 509; *Watterman v. Johnson*, 13 Pick. (Mass.) 361; *Martin v. O'Brien*, 34 Miss. 21; 261; *Manton v. Blake*, 62 Me. 38; *Dana v. Jackson, etc.*, 31 Calif. 120. *Primm v. Walker*, 38 Mo. 94; *Austin v. Rutland Ry. Co.*, 45 Vt. 215; *Paine v. Woods*, 108 Mass. 170; *Mill River, etc., v. Smith*, 34 Conn. 462; *Hodge*

² *Fleischfresser v. Schmidt*, 41 Wis. 223; *White v. Williams*, 48 N. Y. 344; *Call v. Barker*, 12 Me. 320.

bearing trees was found and identified on the ground, it is error to refuse a charge that calls for distances, and quantity must give way to calls for natural and artificial objects, and it is not sufficient to charge that "calls for surveys are important in the following order: (1) Calls for natural objects; (2) calls for artificial objects; (3) calls for course and distance,—but neither absolutely controls another class," where such other class more truly indicates from the evidence the true locality of the land in controversy. *Titterington v. Trees*, 78 Tex. 567; 14 S. W. Rep. 692 (1890).

§ 29. **The Natural Monument Preferred to the Artificial.**—A natural monument, on account of its more stable and permanent character, is always to be preferred to an artificial monument in cases of discrepancies in the description of lands, and this rule of preference must prevail unless it clearly appears from the evidence that the artificial monument is the most reliable index of the boundary.¹

A deed described the boundary of the land conveyed as running to a certain creek, and "thence up the creek at high-water line in a northeasterly direction, the bearing is about north, 86 deg. east." The creek ran south-westerly, but not at the angle named. *Held*, that the creek, being a natural monument, controlled the course, and formed the boundary. Following *Caspar v. Jamison*, 120 Ind. 58; 21 N. E. Rep. 743. *Shepherd v. Nave*, 125 Ind. 226; 25 N. E. Rep. 220 (1890).

§ 30. **Stakes Set in Lot and Block Surveys.**—When, in making surveys of lots and blocks, the lots are staked out upon the ground, the stakes must control without reference to the distances marked upon the plat. The stakes are to be regarded as controlling monuments, and if they are afterward removed, the point where they were previously set or located may be shown and will govern.²

Though the statutes of Michigan authorize a board of supervisors to direct a surveyor to locate lost corners, and to return his survey, and cause it to be recorded, in which case the record shall be competent evidence to establish the corners, if he makes the survey without causing it to be recorded, it is error to allow the fact of his authority to make it to be proved in a case in which he has testified as to the location of the corners, as the jury might

¹ *Brown v. Huger*, 21 How. (U. S.) 11 N. W. Rep. 147 (1882); *Penry v.* 305; *McIver v. Walker*, 4 Wheat. Richards, 52 Calif. 497; *Fleischfresser* (U. S.) 444; *Newsome v. Prior*, 7 v. Schmidt, 41 Wis. 223; *Marsh v. Wheat* (U. S.) 7; *Belran v. Stapleton*, Mitchell, 25 Wis. 706; *Hiner v. People*, 13 Gray (Mass.), 427; *Higginbotham* 34 Ill. 297; *Twogood v. Hoyt*, 42 Mich. v. Stoddard, 72 N. Y. 94; *Cox v.* 609; *Pike v. Dyke*, 2 Greenl. (Me.) *Freedley*, 33 Pa. St. 124; *Lincoln v.* 213; *Brown v. Gay*, 3 Greenl. (Me.) *Wilder*, 29 Me. 169; *Ferris v. Coover*, 126; *Williams v. Spaulding*, 29 Me. 10 Calif. 624; *Fulwood v. Graham*, 112; *Jackson v. Cole*, 16 Johns. (N. Y.) 1 Rich. (S. C.) 491. 256; *Jackson v. Freer*, 17 Johns. (N.

² *Turnbul v. Schroeder*, 29 Minn. 49; Y.) 29.

infer that his acts were official, and give his testimony undue weight for that reason. *Hess v. Meyer*, 73 Mich. 259; 41 N. W. Rep. 422 (1889).

Parol evidence of the former location of the stakes is admissible in ejectment by the plaintiff against the defendants in the action to quiet title. *Caspar v. Jamison*, 120 Ind. 58; 21 N. E. Rep. 743 (1889).

The fact that certain monuments marking the corners of a survey can not be found does not render the lines of the survey unknown or uncertain so that they can be proved by parol evidence, when the field-notes of the survey afford sufficient data for running the lines. *Pickett v. Nelson* (Wis.), 47 N. W. Rep. 936; Am. Dig. 1891, 481-483.

§ 31. **Location of Town Lots.**—The location of town lots may be shown by witnesses from common repute, irrespective of plats.¹ Though it is the more usual practice to use the surveyors' plats.

§ 32. **A River as a Monument.**—The thread of the stream is not, as a general rule, the boundary, where the stream is referred to as a monument, so where land is described as bounding on the shore of a stream, then the shore is the monument and not the stream, and the low-water mark on the shore will be the boundary line, and it will follow the meanderings of the shore, and where the distance along the shore is given, instead of referring to monuments to indicate the terminus of the boundary line the terminus must be ascertained by reducing the irregular shore to a straight line and the given distance measured off upon it.²

§ 33. **Monuments Fixed by Agreement of Parties.**—When a monument is mentioned in a deed, and there is no such monument on the ground, and the parties by consent, at the time, or soon after, erect and place a monument, intending it as and for a monument described in the deed, it will be so deemed afterward as if it had been standing at the time.³

§ 34. **Ponds and Lakes as Boundaries.**—Ponds and lakes are usually natural, and as such frequently become natural boundaries, the edge of the water at low-water mark being the true boundary line.⁴ But it has been held that unless the deed

¹ *Holbrook v. Debo*, 99 Ill. 372 (1881).

² *Shaw, C. J., in Cleaveland v.*

³ *Dunlap v. Stetson*, 4 Mason (U. S.) Flogg, 58 Mass. 76 (1849); *Makepeace* 349; *Babcock v. Utter*, 1 Abb. Pr. (N. v. Bancroft, 12 Mass. 469; *Blaney v.* Y.) 27; *Martin v. Nance*, 3 Head Rice, 20 Pick. (Mass.) 62.

(Tenn.), 650; *Watson v. Peters*, 26 Mich.

⁴ *West Roxbury v. Stoddard*, 7 Al- 516; *Hulsey v. McCormick*, 13 N. Y. len (Mass.) 167; *Wheeler v. Spinola*, 296; *People v. Henderson*, 40 Calif. 54 N. Y. 377; *Manton v. Blake*, 62 32; *Colk v. Stribling*, 1 Bibb (Ky.), 122. Me. 38; *Prim v. Walker*, 38 Mo. 99;

making the conveyance contains evidence that the grantor, in making the description of the land to pass by the conveyance, had in mind the natural condition of the pond or lake, the boundary line will be the low-water mark at the time when the conveyance was made.¹ But ponds and lakes are sometimes artificial; in such case a different rule prevails; the boundary is the center line.² In natural lakes and ponds any change which may be made by artificial means, as enlarging the boundaries and drawing off the waters, does not affect the boundary line.³ With natural changes, however, it is otherwise.⁴

Where one who owns a tract of land that surrounds and underlies a non-navigable lake, the length of which is distinguishably greater than its breadth, conveys a parcel thereof that borders on the lake, by a description which makes the lake one of its boundaries, the presumption is that the parties do not intend that the grantor should retain the title to the land between the edge of the water and the center of the lake, and the title of the purchaser, therefore, will extend to the center thereof. *Lembeck v. Nye*, 47 Ohio 336; 24 N. E. Rep. 686 (1890).

A deed of land bordering on a non-navigable lake or pond, commencing at a known monument on the shore of the pond, and running thence "along said pond to the outlet thereof," conveys only the land to low-water mark and not to the center of the pond. *Disapproving Ledyard v. Ten Eyck*, 36 Barb. 125. *Gouverneur v. National Ice Co.*, 57 Hun, 474; 11 N. Y. Sup. 87 (1890).

Where the description is by metes and bounds, no reference being made therein to the lake, then only the land included within the lines as fixed by the terms used by the parties to the deed will pass to the grantee. *Lembeck v. Nye*, 47 Ohio, 336; 24 N. E. Rep. 686 (1890).

If, however, the call in the description be to and thence along the margin of the lake, no such presumption arises, and the title of the purchaser will extend to low-water mark only. *Lembeck v. Nye*, 47 Ohio, 336; 24 N. E. Rep. 686 (1890).

In a suit to reform a deed to land sold as "bounded on" an artificial lake, and simultaneously resold with like description to defendant, who thereon claimed an interest in the lake, evidence that defendant had, by an ante-

Austin v. Rutland R. Co., 45 Vt. 215; *inson*, 16 Me. 357; 2 Am. & Eng. Canal, etc., v. *People*, 5 Wend. (N.Y.) Ency. 507.

446; 2 Am. & Eng. Ency. 507. ³ *Waterman v. Johnson*, 11 Pick.

¹ *Paine v. Woods*, 108 Mass. 170; (Mass.) 261; *Hathorn v. Stinson*, 12 Wheeler v. *Spinola*, 54 N. Y. 377; Me. 183; see 3 Wash. on Real Property, 417; 2 Am. & Eng. Ency. 507; *Wood v. Kelly*, 30 Me. 47.

² *Waterman v. Johnson*, 13 Pick. *Bradley v. Rice*, 13 Me. 200; 29 Am. (Mass.) 261; *Pinney v. Watts*, 9 Gray Dec. 501.

(Mass.), 269; *Wheeler v. Spinola*, 54 ⁴ *Wheeler v. Spinola*, 54 N. Y. 377; N. Y. 377; *Bradley v. Rice*, 13 Me. 3 Washburn on Real Property, 417. 198; 29 Am. Dec. 501; *Lowell v. Rob-*

cedent contract with the first vendor, agreed to buy the land under the lake, was proof of the intention of the parties to convey only to the margin of the lake, and the deeds should be reformed accordingly. *Fowler v. Vreeland*, 44 N. J. E. 268; 14 Atl. Rep. 116 (1888).

A patent from the United States of a surveyed fractional government subdivision, bounded on a meandered lake, conveys the land to the lake, although the meander line of the survey be found to be not coincident with the shore line. *Everson v. City of Waseca*, 44 Minn. 247; 46 N. W. Rep. 405 (1890).

§ 35. **Rivers Navigable and Not Navigable.**—Rivers are either navigable, a term technically understood as signifying a river in which the tide flows, or not navigable, one in which it does not.¹ At common law it is said that the land under the waters of a navigable river belongs to the public, while that under a river not navigable belongs to the riparian proprietor. As a general rule the true boundary of land described as bounding on a river not navigable, is the center line of the stream, and it changes with the natural changes in the course or location of the stream.²

A patent by the federal government, which in terms bounds the land on the margin of a stream navigable in fact and above tide water, carries the title only to the water's edge, and not to the center of the stream. *Affirming* 11 Pac. Rep. 873. *Packer v. Bird*, 11 S. Ct. Rep. 210 (1891).

Government patents of public lands bordering on streams navigable in fact, issued under the acts of Congress providing for the survey and sale of the public lands, do not take to the middle line of the stream, but stop at the stream. *Following* 7 Wall. 272. *St. Paul, S. & T. F. R. Co. v. First Division St. Paul & P. R. Co.*, 26 Minn. 31; 49 N. W. Rep. 303 (1891).

The calls in a conveyance of land by a riparian owner were: "Thence N., 8 degrees W., 26 9-10 poles to a stake at Ohio river marked 'T'; thence down said river S., 62 degrees W., 81 6-10 poles, to a stake on point at mouth of French creek." Held, that the line along the river was low-water mark, notwithstanding the facts that before the conveyance actual survey was made fixing the point at "I" just over the river bank, and running thence a straight line to point at the mouth of French creek, leaving a space between it and low-water mark, and that a diagram representing such surveying and straight line was made, and the further fact that the deed contained the clause that said calls were to be controlled by the diagram. *Brown Oil Co. v. Caldwell* (W. Va.), 13 S. E. Rep. 42; Am. Dig. 1891, 479.

The boundary of a township described as "beginning at the N. E. corner of section No. 11, T. 4, R. 8 west, on the section line, to Gordon's branch; thence down the meanderings of said branch to the margin of C. creek;

¹ *Washburn on Real Property*, 413; *Kempshall*, 26 Wend. (N. Y.) 404 Com. v. *Chapin*, 5 Pick. (Mass.) 199; *Love v. White*, 20 Wis. 432; *Morgan v. Tibbells*, 19 N. Y. 523. v. *Reading*, 3 S. & M. (Miss.) 366;

² *Hatch v. Dwight*, 17 Mass. 289; *State v. Gilmanton*, 9 N. H. 461.
9 Am. Dec. 145, *Commissioners v.*

thence down on the left bank of said creek to the line between sections No. 3 and 4, in said township," etc., must be considered as drawn at the bank of the stream; the presumption that it is in the middle of the bed of the stream or at low-water mark being positively rebutted. *People v. Board of Supervisors*, 125 Ill. 9; 17 N. E. Rep. 147.

Where a patent confirming a Mexican grant describes the land as follows: "Beginning on the sea-shore at station number 13 of the Ballona rancho," the plat of the survey annexed to the patent representing this common corner of the two ranchos as commencing on the sea-shore, it is to be construed that the land is at that point bounded by the sea, *i. e.*, ordinary high-water mark. *Jones v. Martin*, 35 Fed. Rep. 348 (1888).

Under 3 Rev. St. N. Y. p. 8, § 24, fixing as the boundary line of Warren county the middle of the north branch of the Hudson river, "and of the main stream of said river" to include the whole of every island, any part of which is nearer to the north or east shore than to the other, and to exclude islands any parts of which are nearer to the south or west shore, the main stream is the boundary, subject to such variations as may result from the presence of islands in the main stream and islands not in the main stream, do not affect the course of the boundary, whatever their distances from the respective shores. *In re Spier*, 50 Hun, 607; 3 N. Y. Sup. 438 (1889).

§ 36. **Origin of the Common Law Rule of Navigable Streams.**—By the common law all streams in which the tide ebbed and flowed were navigable streams and all others were not;¹ this rule had its origin in the fact that in England all rivers excepting the Thames were in fact navigable only so far as the tide flowed. In the United States it is difficult to determine in all cases what is a navigable stream, for it is evident that the English doctrine does not apply. Our courts seem to agree upon one point, and one only; when a stream is navigable by boats actually used in the prosecution of commerce, they are navigable notwithstanding the tide does not flow in them, and the public has a right to use them as highways.² In the United States many streams, though not navigable under the common law, are declared to be so by statute. It would be ridiculous to apply this common law doctrine to many of

¹ Washburn on Real Property, 413; Schuylkill Co., 14 Serg. & R. (Penn.) Com. v. Chapin, 5 Pick. (Mass.) 199; 71; Home v. Richards, 4 Coll. (Va.) People v. Tibbetts, 19 N. Y. 523. 441; 2 Am. Dec. 574; Blanchard v.

² The Montello, 20 Wall. (U. S.) 439; Porter, 11 Ohio, 138; Claremont v. Brown v. Chadbourne, 31 Me. 9; 50. Carlton, 1 N. H. 369; 9 Am. Dec. 88; Am. Dec. 641; Ingraham v. Wilkin- O'Fallan v. Doggetts, 4 Mo. 343; 29 son, 4 Pick. (Mass.) 168; 16 Am. Dec. Am. Dec. 640; Middleton v. Pritch- 342; Canal Commissioners v. People, ard, 4 Ill. 510; 38 Am. Dec. 112; Coates 5 Wend. (N. Y.) 423; Commissioners v. Wellington, 1 McCord (S. C.), 580; v. Withers, 29 Miss. 29; McManus v. 10 Am. Dec. 699. Carmichael, 3 Iowa, 1; Schunk v.

our smaller streams on the coast, in which the tide ebbs and flows and which are still too shallow to admit the passage of vessels of the lightest draught.¹ And some of our courts holding that the English common law rule of tidal streams is not applicable in this country, have decided that the title to streams in which the tide flows, but which are not in fact navigable, is in the riparian proprietor, and the boundary line is the *filium aquae*, or center line of the stream.²

§ 37. **No Settled Rule in the United States.**—There is little uniformity of decision in the United States in regard to the ownership of the soil under our fresh water streams, which are open to the public use as highways. Some courts apply the rule of tidal streams, holding the title to be in the State.³ Others hold it to be in the riparian proprietors, so that no general rule can be laid down.⁴

§ 38. **Boundaries—Ad Filum Medium Aquae.**—It seems very clearly settled that, upon all rivers not navigable (and all rivers are not to be deemed navigable above where the sea ebbs and flows) the owner of the land adjoining the river is *prima facie* owner of the soil to the center line or thread of the stream, subject to an easement for the public to pass along and over it with boats, rafts and river craft.

This presumption will prevail in all cases in favor of the riparian proprietor, unless controlled by some express words of description which exclude the bed of the river, and bound the grant on the bank or margin. In all cases, therefore,

¹ 2 Am. & Eng. Ency. 506.

⁴ Com. v. Alger, 7 Cush. (Mass.)

² Glover v. Powell, 10 N. J. Eq. 53; Canal, etc., v. People, 17 Wend. 211; Rowe v. Bridge Co., 11 Pick. (N. Y.) 595; Houck v. Yates, 82 (Mass.) 344; State v. Gilmanton, 14 Ill. 179; Steamboat Magnolia v. Marshall, 39 Miss. 109; Adams v.

³ Barney v. Keokuk, 94 U. S. 324; Pease, 2 Conn. 481; Palmer v. Mulligan, 3 Caines (N. Y.) 307; 2 Am. Wainwright v. McCulloch, 63 Pa. St. Dec. 270; Bay City, etc., Co. v. Industrial Works, 28 Mich. 182; Blanch-ard v. Porter, 11 Ohio, 138; Claremont v. Carleton, 2 N. H. 369; 9 Am. Benson v. Morrow, 61 Mo. 345; Tomlin v. Dubuque, etc., 32 Iowa, 106; 343; Branton v. Bressler, 64 Ill. 488; Shrunk v. Schuylkill Co., 14 Serg. & Rhodes v. Otis, 33 Ala. 578; Ryan v. R. (Penn.) 71; Bullock v. Wilson, 2 Brown, 18 Mich. 196. Post (Ala.), 436.

where the river itself is used as a boundary, the law will expound the grant as extending *ad filum medium aquae*.¹

If the boundary line is described in the instrument of conveyance as extending from one object on the shore of a stream to another—as, for example, bounding on the river and extending from one tree on the shore to another. Or if a stream is referred to in general terms as the boundary—as, for example, where the land is described as running along or bounded on the river, the river will be considered a monument and the center line will be the boundary. The terminus of the boundary can be ascertained by drawing a line from two objects at right angles with the shore to the thread of the stream.²

The words, “to a tree on the bank of a river, thence up said river,” in the description of land conveyed by deed, locate the line at the thread of the stream, and that location is not changed by other words in the same description giving the length of lines and quantity of land conveyed. *Kent v. Taylor*, 64 N. H. 489; 13 Atl. Rep. 419 (1888).

When the channel of a creek adopted as a boundary is material, and it is alleged that the channel has changed, evidence tending to show the location of the channel several years before its adoption as a boundary is inadmissible. *Wilhelm v. Burleyson*, 106 N. C. 381; 11 S. E. Rep. 590 (1890).

In an action between two adjoining owners to try title to land, it appeared that the north bank of a certain stream was the boundary line between the parties. There was evidence that the parcel in controversy was an island during high water, and that the main channel had been on the south side of the island at the date of the deeds under which the parties claimed, but by a sudden freshet had since been diverted to the opposite side. *Held*, that the ownership of such island depended upon the location of the main channel at the time of the execution of the deeds describing the north bank as the boundary line, and was not affected by the shifting of the stream to the other channel. *Degman v. Elliott* (Ky.), 8 S. W. Rep. 10 (1888).

It has been held, that if lands be described as bounded on the sea or salt water, the grantee will hold the lands to low-water mark, so that does not hold more than one hundred rods below high-water mark. *Stover v. Freeman*, 6 Mass. 435; *Commonwealth v. Inhabitants of Charlestown*, 1 Pick. (Mass.) 180; *Austin v. Carter*, 1 Mass. 231.

If the land be described as bounded on a river, the grantee will hold to the thread of the river. *Lunt v. Holland*, 14 Mass. 149; *Hatch v. Dwight*, 17 Mass. 289.

By parity of reason, where land is described bounding along a highway or upon a highway, it ought to be extended that the grantee should hold to the middle of the highway (*Jackson ex dem. Yates v. Hatheway*, 15 Johns. (N. Y.) 447; *Jackson ex dem. Kingston v. Low*, 12 Johns. 252) or

¹ *Shaw, C. J.*, in *Deerfield v. Ames*, Wend. (N. Y.) 451; 35 Am. Dec. 637; 17 Pick. (Mass.) 42 (1835). *Newton v. Eddy*, 23 Vt. 319; *Rob-*

² *Railroad v. Schurmeirer*, 7 Wall. 100; *inson v. White*, 42 Me. 218; *Cox v.* (U. S.) 286; *Newhall v. Ireson*, 13 Freedley, 33 Pa. St. 129; *McCollough Gray* (Mass.), 262; *Luce v. Carley*, 24 v. Aten, 2 Ohio, 425.

the whole of the highway in case the soil belonged to the grantor, who is not a proprietor of the lands on the opposite side of the way. But in *Hatch v. Dwight*, 17 Mass. 289, it was held that a deed describing lands as running to the bank of a river, did not pass the soil to the thread of the river, and in *Stover v. Freeman*, 6 Mass. 435, it was held that a deed describing lands as running to the shore, and by the shore, did not pass the flats. And in *Lufkin v. Haskell*, 3 Pick. (Mass.) 356, it was held that a grant of "thatch bank upon an isthmus between two rivers, which is covered by the sea at high water," did not pass the lands to the channels of the rivers on each side, and that the ordinance of 1641 was inapplicable to such a grant. See note to *Little, Brown & Co's Edition Mass. Repts.*, Vol. 10, 149.

§ 39. **A Meander Line.**—As the term denotes, a meander line is a winding or indirect course. In boundaries it signifies a line which follows the sinuosities of a stream, the shore of a body of water, or in some cases a highway.¹

"Meander" means to follow a winding or flexuous course; and where, in a deed, one of the boundaries of the land conveyed is described as "beginning at a stake in the bay of shallows; * * * thence, with the meander of the stream, 1st, N., 60 deg. W., 20 chs., to Shark's point," *held*, that the line described is the boundary line of the river. *Turner v. Parker*, 14 Or. 340; 12 Pac. Rep. 495 (1887).

Under a description in a patent as follows:—"Thence meandering down the right bank of Kings river," the river is properly considered one of the boundaries of the land. *Heilbron v. Kings River & F. C. Co.*, 76 Cal. 11; 17 Pac. Rep. 933 (1888).

But patents by the general government of public lands bordering on streams are not limited by the meander lines. Following *Schurmeier v. Railroad Co.*, 10 Minn. 82 (Gil. 59) and 7 Wall. 272. *St. Paul, S. & T. F. R. Co. v. First Division St. Paul & P. R. Co.*, 26 Minn. 31; 49 N. W. Rep. 303.

A patent calling to run with the meanders of the Cumberland river passes title to the bed of the river to the middle of the stream, unless the terms of the grant clearly limit the grantee's right of property to the margin of the river, with the usufruct of the water to the middle of the stream, subject to the public easement of navigation, and to the usufructuary rights of other proprietors above and below. *Kentucky Lumber Co. v. Green*, 87 Ky. 257; 8 S. W. Rep. 439 (1888).

Where a patent describes a line as beginning at a corner on a branch and running "up the branch and binding thereon," the line must follow the water-course, and not the courses and distances as found by survey. *Bailey v. McConnell* (Ky.), 14 S. W. Rep. 337; Am. Dig. 1891, 474.

A grantor in a deed clearly evinced an intention to convey the one half of a distinct tract of land which bordered on tide water, and the boundary of the moiety was described in the deed as commencing at a certain stake on the south, and running due north to a stake on the north line of said tract; thence west along said line to the corner; thence south to the southwest corner; thence east to the place of beginning; and it appeared that said southwest corner was at the meander line of such tide water. *Held*,

¹ *Schurmeier v. Railroad Co.*, 10 Minn. 997; *Turner v. Parker*, 14 Oreg. 340.

that it must be presumed that the beginning point of the boundary was upon said meander line, and that the course from the southwest corner to that point was intended to be along such meander line, and not on a direct line between those points, the said meander line being the south boundary of such half.

In taking distances from one point to another on navigable water, the measurement is by its meanders, and not in a direct line. *Rayburn v. Winant*, 16 Or. 318; 18 Pac. Rep. 588 (1888).

A government "lot" was platted as bounded on the north by a meandered water-course, whose actual shore line was about 320.6 feet north of the meandered line; the lot being merely described as numbered on the plat. *Held*, that its east line ran due north until it intersected the actual shore line, and thence to the middle thread of the stream, at right angles with such thread, and did not turn at its point of intersection with the meander line; the latter line being run, not as a boundary, but merely to determine the number of acres in the lot. *Menasha Wooden-Ware Co. v. Lawson*, 70 Wis. 600; 36 N. W. Rep. 412 (1888).

A patent from the United States of a surveyed fractional government subdivision, bounded on a meandered lake, conveys the land to the lake, although the meander line of the survey be found to be not coincident with the shore line. *Everson v. City of Waseca*, 44 Minn. 473; 46 N. W. Rep. 405 (1890).

§ 40. **Public Highways, Streets, etc.**—When the land in question is bounded by a public highway, such as a street, avenue or alley, the location of the boundary line depends upon what kind of a title the public have in the highway. If the public have only an easement or right of way over the soil, the center line of the street is the true boundary line when no different intention appears in the deed.¹ But if the public own the fee or soil of the highway, then the edge of the highway next to the land in question is the boundary line.² The highway may be and often is named as a monument instead of a boundary; in the description of lands conveyed in this case, what has been said of rivers and streams as monuments applies equally well to highways.³

In an action of ejectment, hinging upon the correct location of a street forming a boundary line, a grant of lands upon a public street as a boundary will be referred to such street as opened and used. *O'Brien v. King*, 49 N. J. L. 79; 7 Atl. Rep. 34 (1887).

¹ 2 Am. & Eng. Ency. 507.

53; *Stark v. Coffin*, 105 Mass. 328;

² *White v. Godfrey*, 97 Mass. 472; *White v. Godfrey*, 79 Mass. 472; *Dunham v. Williams*, 37 N. Y. 251; *Kings, etc., Ins. Co. v. Stevens*, 87 N. Y. 287; *Falls v. Reis*, 74 Pa. St. 493; *Dunham v. Williams*, 37 N. Y. 287; *Wallace v. Fee*, 50 N. Y. 691; 251. *Winter v. Peterson*, 24 N. J. L. 527;

³ *Banks v. Ogden*, 2 Wall. (U. S.) 57; *Harris v. Elliott*, 10 Pet. (U. S.) 57; *Cox v. Freedley*, 33 Pa. St. 124; *Witter v. Harvey*, 1 McCord (N. C.), 67;

A deed conveying a parcel of land described as bounded by a street, conveys title to the center of the street, subject to the use of the public. *Schneider v. Jacob*, 86 Ky. 101; 5 S. W. Rep. 350.

A deed of lots according to a plat on which the lots are bounded on one side by an alley passes title to the center of the alley, where the grantor's title extends thereto. Following *Schneider v. Jacob*, 5 S. W. Rep. 350; *Jacob v. Woolfolk* (Ky.), 14 S. W. Rep. 415 (1890).

General terms of description in a deed, like "to," "upon," or "along the highway" or railroad, do not convey the land to the center of the highway or railroad, unless the grantor owns the fee of the highway or railroad. *Church v. Stiles*, 59 Vt. 642; 10 Atl. Rep. 674 (1887).

Under a deed of land bounded by a street, according to a map referred to, the line of the street as actually surveyed is the boundary of the land conveyed. *Andreu v. Watkins* (Fla.), 7 So. Rep. 876; Am. Dig. 1891, 477.

§ 41. Priority Among Different Grantees.—When the owner of a tract of land supposed to contain a certain number of acres, conveys to one party a certain number of acres off of one side of the tract, and then enters into an agreement to convey a certain number of acres lying along side of the former grant, to another party, who takes possession under the agreement—afterward the owner conveys a certain number of acres off of the other side to another party—upon making a survey it is found there is not land enough in the tract to make up the amount of land conveyed, here the first grantee will take his allotment first. The second party will next be entitled to his amount, as he has a title in equity, and being in possession, the subsequent grantee was bound to take notice of his rights, and he may maintain a bill to enjoin the last grantee from prosecuting a suit in ejectment for the recovery of sufficient of his land to make up his deficiency.¹

Where parties, owning contiguous estates, derive title from a common author, and a controversy arises as to the boundary between them, the elder title must be first satisfied, and when that title conveys a fixed quantity of land, the holder is entitled to take such quantity. *Keller v. Shelmire*, (La.) 7 So. Rep. 587; Am. Dig. 1890, 439.

Trustees v. Lander, 8 Bush (Ky.), 680; ¹ *Seager v. Cooley*, 44 Mich. 14; 5 *Canal Trustees v. Havens*, 11 Ill. 557; N. W. Rep. 1058 (1880); *Rood v. Palmer v. Dougherty*, 33 Me. 507; *Chapin*, Walk. Ch. (Mich.) 79; *God-Geer v. Barnum*, 37 Conn. 229; *Weisbrod v. Chicago, etc.*, R. Co., 18 Wis. 160; *Russell v. Sweezey*, 12 Mich. 43; *Dubuque v. Maloney*, 9 Iowa, 235. 458; *Oxton v. Groves*, 6 Me. 371; *Salter v. Jones*, 10 Vroom (N. J.), 469; 23 Am. Rep. 229.

§ 42. **Power of Courts to Order Surveys of Defendant's Premises.**—The question frequently arises as to the power of courts to compel the defendant to consent to a survey of the premises in his possession for the purpose of locating monuments or to ascertain, in certain cases, the amount of land in his possession, where these facts can not be satisfactorily ascertained without going upon the lands. It has been held that courts have no such power in actions for the recovery of the possession of the premises in question.¹

¹Jackson v. Hogeboom, 9 Johns. (N. Y.) 83.

CHAPTER XVI.

COMMON SOURCE OF TITLE.

- § 1. Title Through a Common Source.
2. Common Source of Title not Admitted.
 3. As to how Common Grantor Derived his Title not a Material Inquiry.
 4. The Rule Stated by Greenleaf.
 5. The Rule Under Statutes.
 6. Form of Affidavit—Title from a Common Source.

§ 1. **Title Through a Common Source.**—Where the parties, plaintiff and defendant, in actions for the recovery of the possession, claim title from a common source, the plaintiff in the first instance will only be required to show a title in himself from the common source.¹

Plaintiff in ejectment, in proving title, need not go further back than the common source of title, where the defendant claims under the same person. *Johnson v. Cobb*, 29 S. C. 372; 7 S. E. Rep. 601 (1888).

Where both parties claim title from the State, it is sufficient for plaintiff to show that he has the better title from it. *Nitche v. Earle*, 117 Ind. 270; 19 N. E. Rep. 749 (1889).

Where both parties in ejectment claim through a common grantor, it is sufficient for plaintiff to trace title to that source. *McWhorter v. Hetzel*, 124 Ind. 129; 24 N. E. Rep. 743 (1890).

The rule in force in the District of Columbia requiring plaintiff in ejectment to show title out of the United States is sufficiently complied with, in a suit where both parties claim under a common source of title, by a paper title thereunder in plaintiff derived from such source, and by a bill in equity, although it was subsequently dismissed, in which defendant had admitted the common title, although such proof is not conclusive upon defendant. *Beale v. Brown* (D. C.), 16 Wash. L. Rep. 815 (1888).

§ 2. **Common Source of Title not Admitted.**—It must be understood that the rule laid down in the foregoing section applies to cases where the common source of title is either admitted by the defendant or established by the plaintiff's

¹ *Izler v. Hailey*, 24 S. C. 382 (1885); 350 (1865); *Rosevelt v. Hungate*, 110 Wis. 595 (1884); *Miller v. Hardin*, 64 Mo. 545 (1877); *Pollock v. Maison*, 41 Ind. 433 (1867); *Orton v. Noonan*, 19 Wis. 516 (1866).

under an incumbrance created by the common grantor prior to the title of the plaintiff.¹

On the trial of an action in ejectment the plaintiff showed by affidavit that a certain person was the common source of each party's title, and then introduced in evidence a deed of conveyance from the person so shown to be the common source of title, and rested his case. It was held that this proof made out a *prima facie* case for the plaintiff and entitled him to recover unless a good defense was shown. *Rosevelt v. Hungate*, 110 Ill. 595.

Where both plaintiffs and defendant claim title from a common source, and plaintiffs' title is prior in time, and no other fact appears, they are entitled to recover. *Slack v. Swaim* (Miss.), 8 So. Rep. 545 (1890).

§ 5. **Title Through a Common Source Under Statutes.**—In many States we find statutory provisions for the trials of actions in ejectment where the parties claim title through a common source. As an illustration of these provisions we quote the statute of Illinois:

"If the plaintiff, or his agent or attorney, will state on oath, upon the trial, that he claims title through a common source with the defendant, it shall be sufficient for him to show title from such common source, unless the defendant, or his agent or attorney, will deny on oath that he claims title through such source, or will swear that he claims title through some other source."²

On the trial of an action in ejectment at the Livingston Circuit, one S. S. L., being sworn, stated he was attorney for the plaintiff; that he was acquainted with the title to the lands in controversy, as it appeared of record; that both plaintiff and defendants claimed title from the same common source, stating what it was; and that he also knew this from conversation with the parties. On being cross-examined, he stated his only knowledge was derived from the records, and what defendant said when he purchased; that he had no recent conversation with him on the subject, and did not know what he might then claim.

In passing upon the sufficiency of this evidence under the statute Mr. Justice Scholfield said: "We are of the opinion this was sufficient. The section must have a reasonable construction, and it can not be required that a party, to avail of its benefit, must be able to positively state that he knows the

¹ 2 Greenleaf on Evidence, 288, 13 S. & M. (Miss.) 103; *Huls v. Buntin*, § 307; *Tillinghast's Adams on Ejectment*, 248; *Sparhawk v. Bullard*, 1 47 Ill. 396 (1868).
² R. S. Ill. 1889, 593 § 25; *Laws of Met. (Mass.)* 95 (1840); *Oakes v. Maury*, Ill. 1872, 373, § 15.
 10 Pick. (Mass.) 195; *Wolfe v. Dowell*,

secret thoughts of his adversary at the time he makes the oath. A party purchasing a particular claim to property, and placing a deed therefor on record, is presumed to claim in accordance with that purchase and deed; and in the absence of evidence of any other or different claim, another person, acquainted with such purchase, and the contents of such deed, might well swear that he knew the nature of his claim.

If defendant in fact claimed under another or different source of title, it was only necessary that he should have so stated on oath, when the plaintiff would have been compelled to go behind that source of title. Not having done so he has no cause to complain that the plaintiff was permitted to commence with his evidence where he did.¹

§ 6. **Form of Affidavit of Title from a Common Source** (Illinois Statute).

STATE ———	}	ss.	Circuit Court ——— Term, A. D. ———.
County of ———			
A ——— B ———	}		<i>Ejectment.</i>
v. C ——— D ———			

A ——— B ———, the plaintiff above named, being duly sworn, on oath states that C ——— D ———, the defendant herein, claims title to the premises in controversy in this suit from E ——— F ———, and that he, the said plaintiff, also claims title to the said premises from the same E ——— F ———, and so he says that he, the said plaintiff, claims title through a common source with the defendant in this suit.

A ——— B ———.

Subscribed and sworn to before me this ——— day of ———
A. D. ———.²

¹ Hartshorn v. Dawson, 79 Ill. 108 (1875).

² C. & St. L. R. R. Co. v. Parrott, 92 Ill. 194 (1879).

CHAPTER XVII.

CHAIN OF TITLE.

- § 1. The Term Defined.
- 2. Source of Title.
- 3. The Starting Point in the Chain.
- 4. Chain of Title from a Common Source.
- 5. Title of Common Grantor—Unnecessary to Prove, When.
- 6. Variances.
- 7. *Idem Sonans*—The Doctrine of.
- 8. Names of Persons.
- 9. Identity of Names and Persons.
- 10. Initials.
- 11. Order of Proofs.
- 12. Presumptions as to the Jurisdiction of Courts.
- 13. Care in Making up the Chain.

§ 1. **The Term Defined.**—By the term, chain of title, in actions for the recovery of the possession of real property, is meant the series or connecting muniments of title offered in evidence by the plaintiff to maintain the action, and by which he traces his title back to the original source of the title of the lands and premises in controversy, and connects himself therewith, or to some more recent but common source of title from which also is derived the title of his adversary. The term also applies to muniments of title relied upon by the defendant to connect his title or possession with some outstanding title in a third person as evidence of his defense.

§ 2. **Source of Title.**—A title is defined by Lord Coke to be the means whereby the owner of lands has the just possession of his property.¹ The source of all title to real property in this country, as a general rule, is the Government, in some cases being the Government of the United States and in others that of the respective States.² Upon the discovery of this country a kind of ownership was recognized in the Indian tribes, but there was no well defined idea of individual proprietorship in

¹ Coke on Littleton, 345.

² 3 Washburn on Real Property, 163.

landed property beyond the limits of their actual possession, and no title or right of ownership beyond the right of occupation seems to have been recognized in the Indian tribes by any of the European governments, or their successors, the Colonies, the States, or the United States.¹

In this respect the rule seems to have been uniform with all Christian nations that planted colonies in this country. No seizin of lands was recognized by them in the Indian occupants. A conveyance by an Indian was simply regarded as extinguishing his claim and not as transferring in any manner the soil or the freehold. Under these conveyances the purchaser's title grew out of his making an actual entry upon the lands under a claim of title, rather than from the mere circumstance of the Indian's deed. None of the English patents making grants of land in this country make an exception or even mention of the Indian title.²

The general property of the soil in the original English colonies was claimed by and conceded to Great Britain by the right of discovery. This general property of the soil was granted by the king and sometimes by act of parliament to companies or proprietors by letters patent, etc., under which communities were formed with greater or less powers of jurisdiction and government into colonies, provinces or proprietaries, according to the style and form of their organization.³ All lands lying outside of these grants remained the property of the crown, as representing the British nation. After the achievement of the independence of the colonies, whatever territory had belonged to Great Britain became the property of the General Government of the United States as the successor of the British Crown.

To these lands were added extensive territories north and west of the Ohio river, ceded by the States to the General Government as a common fund for the joint benefit of the Union—the purchases of Louisiana and Florida, and the acquisition of territory by cession from Mexico. All this became subject to the power of the General Government to dispose of by grant or otherwise, while the lands acquired by the several States as successors of the colonies, or by cession from the Gen-

¹ 4 Dane's Abridgment, 68-70.

³ Worcester v. Georgia, 6 Pet. (U. S.)

² 3 Washburn on Real Property, 164; 544; 3 Washburn on Real Property, 165.

4 Dane's Abridgment, 68-70.

eral Government, and which had not been appropriated to individual ownership, were subject to like disposal on the part of the States respectively.¹

§ 3. **The Starting Point in the Chain.**—In actions of ejectment it is seldom necessary, at least in the older portions of the country, to go back to the government as a source of title or starting point in the chain of the plaintiff's title. The government in this country is the common source of all titles, but it very frequently happens that a common source of title may be found after the government parted with its title to the lands in controversy. In such cases the plaintiff is not required to go back further than the latest common source as a starting point in the chain of his title.

§ 4. **The Chain of Title from a Common Source.**—The rule has been firmly established that in actions of ejectment, where both parties claim from a common source of title, the plaintiff will only be required to show a good and connected chain of title, from the common source down to himself, to entitle him to recover.² In such cases if the plaintiff shows the better title as between himself and the defendant, although it may not be free from objection, he will, nevertheless, be entitled to recover, unless the defendant shows a paramount outstanding title in another.³

§ 5. **Title of Common Grantor—Unnecessary to Prove, When.**—The rule seems to be well settled that a party is estopped from denying a title under which he claims to derive his right to the premises in dispute. Where both parties claim title from the same grantor it is sufficient to establish a *prima facie* case to prove derivation of title from the common grantor without proving his title.⁴

§ 6. **Variances.**—It is a matter of common occurrence in making transfers of real property in this country, where such matters are frequently intrusted to ignorant and illiterate persons, that variances appear in the names of grantors and

¹ Terrett v. Taylor, 9 Cranch (U. S.), (1885); 3 Wait's Act. & Def., 16; Holbrook v. Brenner, 31 Ill. 501.

² McConnell v. Johnson, 3 Scam. 422; Ferguson v. Miles, 3 Gil. 15 N. W. Rep. 206 (1883); Hart's Lessee v. Johnson, 6 Ohio, 89; Conger v. Converse, 9 Iowa, 554; Doe v. Johnson, 3 Ill. 522.

³ Smith v. Laatsch, 114 Ill. 271

grantees—careless spelling of the names. These variances are often so marked, especially where foreign names are used, as to apparently break the chain of title and to require proof *aliunde*, often difficult to obtain, to supply the deficiency. In the use of foreign names, however, courts are slow to pronounce that a variance, unless it is palpable, which may only be a misspelling or a mispronunciation by persons ignorant of the language in which the same is written. So, where a plaintiff in making out his title in ejectment, gave in evidence a deed to Mitchell Allen and a deed from Micheal Allaine and insisted the names represented the same person, it was held there was no variance. The names were French names, and the difference in spelling Mitchell and Micheal would result from giving the name the English or the French pronunciation.¹

§ 7. **Idem Sonans (Sounding the Same)—The Doctrine of.**—In pleading, when a name which it is material to state, is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient.² The same rule applies to all muniments of title, in making up a chain of title in actions of ejectment.³ Instruments in writing are not void because made to a party by a wrong name, and any misnomer or apparent variance may be reconciled and explained in pleading, by averment, and avoided in effect by proof.⁴

Stephen A. Douglas, when justice of the Supreme Court of Illinois, laid down the following rule: "In relation to variances, courts at the present day are not confined to the rigid rule of *idem sonans*, but adopting a more liberal and reasonable one, inquire whether the variance be material or immaterial. If there be a material and substantial variance, it is fatal, otherwise it is not." *Stevens v. Stebbens*, 3 Scam. (Ill.) 25 (1841).

§ 8. **Names of Persons.**—By the common law the name of an individual consists presumptively of one Christian, bap-

¹ *Chiniquy v. Catholic Bishop*, 41 Ill. 148 (1866). plaintiff's title there was a deed to *Otaine Allaine* and a deed from

² *Bouvier's Law Dic.*, 596.

³ *Chiniquy v. Catholic Bishop*, 41 Ill. 148 (1866); *Lyon v. Kain*, 36 Ill. 362 (1865). and from the same person, it was held that there was not a fatal variance. These names were French,

⁴ *Peake v. The Wabash, etc., R. R. Co.*, 18 Ill. 88 (1856); *Angell & Ames on Corp.*, 512, 516; *Games et al. v. Stiles, etc.*, 14 Pet. (U. S.) 322 (1840). On the trial of an action of ejectment where, in the chain of *Otaine* took by a misnomer and conveyed by his right name. *Chiniquy v. Catholic Bishop*, 41 Ill. 148 (1866).

tismal or given name, and also one surname, family name, or patronymic.¹ Since the time of William of Normandy, a full name consists of one Christian, or given name, and one surname or patronymic; the two, using the Christian name first and the surname last, constitutes the legal name of the person.²

The middle name or names or the middle initials or letters of a person's name are not material in legal proceedings, and a variance in such matters is immaterial;³ such letters and names may be omitted altogether.⁴

Father and son having the same name, when that name is used without explanation, the father *prima facie* is intended. *Brown v. Berright*, 3 Blackf. 39; 23 Am. Dec. 373; *Graves v. Colwell*, 90 Ill. 615; *People v. Cook*, 14 Barb. 300; *Padgett v. Lawrence*, 10 Paige, 170; 40 Am. Dec. 232.

"Junior" or "Senior" is no part of a man's name and need not be affixed to the name or signature of a person. *Johnson v. Ellison*, 4 T. B. Mon. (Ky.) 526; 16 Am. Dec. 163; *Brainard v. Stilphin*, 6 Vt. 9; 27 Am. Dec. 532; *Lepiot v. Browne*, 1 Salk. 7; *Goodhue v. Berrien*, 2 Sandf. Ch. 663; *Farnham v. Hildreth*, 32 Barb. 280; *Hadley v. Shaw*, 30 Ill. 354.

The law knows but one Christian name, and the omission of a middle letter or name is of no importance. *State v. Martin*, 10 Miss. 391; *Gotobed's Case*, 6 City Hall Rec. 25; *Franklin v. Talmadge*, 5 Johns. 84; *Van Voorhis v. Bud*, 39 Barb. 479; *Roosevelt v. Gardinier*, 2 Cow. 463; *Milk v. Christie*, 1 Hill, 192; *McKay v. Spick*, 1 Tex. 376; *Edmonston v. The State*, 17 Ala. 179; *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597.

The law knows but one Christian name and where one Christian name is stated, and also the initial letter of another Christian name, the initial letter may be rejected as a surplusage, and need not be proved. *Dilts v. Kinney*, 3 Green (N. J.), 130; *Thompson v. Lee*, 21 Ill. 242; *Erschine v. Davis*, 25 Ill. 251; *Bletch v. Johnson*, 40 Ill. 116; *Isaacs v. Wiley*, 12 Vt. 674; *Allen v. Taylor*, 26 Vt. 599; *State v. Manning*, 14 Tex. 402; *People v. Lockwood*, 6 Cal. 205; *Bratton v. Seymour*, 4 Watts, 329; *contra*, *Price v. State*, 19 Ohio, 423; *The State v. Hughes*, 1 Swan (Tenn.), 261.

§ 9. Identity of Lands and Persons.—The identity of the lands in dispute, and the persons in whom the legal seizin is claimed, is one of the essentials to make the perfect chain of title. The identity of the lands is generally established by the usual means or instruments of evidence, and when the plaintiff traces his title back to a person bearing the same name as the person in whom the seizin is claimed to be, the

¹ 16 Am. & Eng. Ency. 113; *Frank State v. Bowman*, 78 Iowa, 519; *Rooks v. Levie*, 5 Robt. (N. Y.) 599; *Vawter v. State*, 83 Ala. 79; *Choen v. State*, 52 Ind. 347; 21 Am. Rep. 179; *People v. Gilliland*, 55 Ind. 278.

² *Scofield v. Jennings*, 68 Ind. 233. *v. Ferris*, 56 Calif. 442.

³ *Tucker v. The People*, 122 Ill. 583; ⁴ 16 Am. & Eng. Ency. 114.

presumption is that he has connected himself with the true source of title.¹

§ 10. **Initials.**—The initials of a person's name are the first letters of his name, and the rule that they can not be used to designate an individual is not so strictly applied in cases of the names of persons who are not parties to the action. It is generally held sufficient in giving the names of third persons in civil and criminal actions to designate them by the initials of their Christian names.² And the same rule undoubtedly applies to the names of parties to the conveyances in the chain of title, but where an objection is taken proof of identity is proper.

§ 11. **Order of Proofs.**—It is the right of a defendant in an ejectment suit to show, by way of defense, title in himself, or an outstanding title in a third party; and in establishing a chain of title, either in himself or another, he has the right to commence anywhere in his chain of title he pleases, and the court can never know till he is through whether his chain is a perfect one or not. If, when he is through, a link is wanting, the whole must fall, and should, on motion, be excluded from the jury,³ and the same is true as to the plaintiff's chain of title.

§ 12. **Presumptions as to Jurisdiction of Courts.**—Where a record or decree of a court is called in question collaterally as a link in the chain of title, as is frequently the case in actions of ejectment, it may be regarded as a general rule that, in all courts of general jurisdiction, nothing is presumed to be out of their jurisdiction but what specially appears to be so; but, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged.⁴ When the record or decree is silent as to the jurisdiction of the court over the defendants, in the absence of evidence showing that jurisdiction was not acquired, it will be presumed that the court had jurisdiction. And where the court appointed a guardian *ad litem* for minor defendants, and the guardian answered, the presumption is that the minors were served with process, or the court would not have appointed a guardian *ad litem*.

¹ Jackson v. Goss, 13 Johns. (N. Y.) State, 26 Ohio St. 505; State v. Brite, 518; Jackson v. Bondman, 15 (N. Y.) 73 N. C. 26; 16 Am. & Eng. Ency. 226; Jackson v. Cody, 9 Cow. (N. Y.) 130.

140.

³ Asher v. Mitchell, 92 Ill. 491 (1879).

² Ferguson v. Smith, 10 Kan. 396; ⁴ Swearer v. Gulick, 67 Ill. 208. State v. Black, 31 Tex. 560; Meade v.

Service of process was the primary inquiry, and it will be presumed the court ascertained that fact before proceeding to adjudicate on other questions in the case.¹

Where, in a suit brought by heirs for the partition of their ancestor's land, the petition alleges that the ancestor is dead, and that the petitioners are his heirs, a decree which finds that the allegations of the petition are true is, in a subsequent action for ejectment for the same land, *prima facie* evidence of such death and heirship. *Benfield v. Albert*, 132 Ill. 665; 24 N. E. Rep. 634 (1890).

§ 13. **Care in Making Up the Chain of Title.**—In making up the chain of title in preparing the case for trial, care should be taken to see that each muniment of title which goes to make a link in the chain is complete, so that no break may occur on the trial. Public documents should be carefully examined to see that they are properly authenticated. Every deed of conveyance should be critically inspected to see that it has been properly executed and acknowledged, as required by law. When it becomes necessary to use records of public offices or courts, care should be taken to see that copies are properly certified, and that the certificates of the custodians and clerks are in proper legal form. Parties litigant and their attorneys can not be too cautious in this matter.

¹ *Benfield v. Albert*, 132 Ill. 671; 24 N. E. Rep. 634 (1890); *Swearer v. Gulick*, 67 Ill. 208.

CHAPTER XVIII.

THE ESTOPPEL TO DENY TITLE.

- § 1. Estoppel to Deny Title.
- 2. Who Are Estopped to Deny Title.
- 3. Landlord and Tenant.
- 4. The Doctrine Applied to Persons in Possession Under a Tenant.
- 5. The Rule Applies to Subtenants.
- 6. The Reasons for the Rule.
- 7. Exceptions to the Rule.
- 8. When the Landlord Parts with His Title.
- 9. Vendor and Vendee.
- 10. The Doctrine of Doubtful Application.
- 11. Debtor and Purchaser at Execution Sale.
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- 13. Between Mortgagor and Mortgagee.
- 14. Application of the Estoppel.
- 15. Extent of the Estoppel.
- 16. Fraud, Misrepresentation, etc., Destroys the Estoppel.

§ 1. **Estoppel to Deny Title.**—In discussing the essentials of the plaintiff's case in ejectment, we find a class of cases in which the strict rule requiring him to establish by competent proof such a chain of title from some recognized source of title as will entitle him to the possession of the premises in question, is somewhat relaxed. In this class of cases the defendant is not permitted to assail the plaintiff's title; this rule of law is said to be founded on the doctrine of estoppel and applies where some privity of estate has existed between the parties. Proof of title in the plaintiff is not, in general, necessary, for the reason that the law does not permit a party to dispute the title of him by whom he has been let into possession.¹

¹ If a defendant has acknowledged 353; Doe v. Pettett, 5 Barn. & A. 223; the title of the plaintiff, he can not Lessee of Galloway v. Ogle, 2 Binn. afterward dispute it. Jackson v. (Penn.) 472; Graham v. Moore, 4 Serg. Reynolds, 1 Cai. R. (N. Y.) 444; Jack- & R. (Penn.) 467; Jackson v. Davis, 5 son v. Cuerden, 2 John. Cas. (N. Y.) Cow. (N. Y.) 129; Jackson v. Bard, 4

A person who has entered into possession under another, and acknowledged his title, can not set up an outstanding title in a third person. *Jackson v. Stewart*, 6 Johns. (N. Y.) 34; *Jackson v. De Walts*, 7 Johns. (N. Y.) 157.

A pastor having been let into possession of a parsonage by the church, under the agreement that he should have the use and benefit thereof as part of his compensation, he can not, in an action for possession by the church after its incorporation, dispute its title. *West Koshkonong Congregation v. Ottesen* (Wis.), 49 N. W. Rep. 24; Am. Dig. 1891, 1622.

Where defendant in his answer claims the right to the possession as a purchaser from plaintiff, he is thereby estopped to deny plaintiff's title, and it is not necessary for plaintiff to prove title in order to recover. *Cutler v. Babcock* (Wis.), 48 N. W. Rep. 494; Am. Dig. 1891, 1395.

A surety on a note given by a tenant for the rental of land can not dispute the authority of the lessor, when the tenant was given, and held, full and peaceable possession of the land for the entire term of the lease. *Oliver v. Gary*, 42 Kan. 623; 22 Pac. Rep. 733 (1889).

Where one of defendants was, at the time an action to recover land was brought, and for several years before had been, a tenant under plaintiff and those through whom he claimed, the fact that tenant was in possession when the action was brought, with his co-defendant, who had the title to one-half of the land, would not prevent a judgment for plaintiff as against his tenant, the tenant not being permitted to deny his landlord's title. *Springs v. Schenck*, 99 N. C. 551; 6 S. E. Rep. 405 (1888).

One who acquires possession of lands from another as his agent can not withhold the possession from him, and, in ejectment, put him to proof of title. *Hoskins v. Byler*, 53 Ark. 532; 14 S. W. Rep. 864 (1890).

The plaintiff, in making out title under a sheriff's deed, proved that the judgment debtor was in possession of the premises several years before the judgment; and that the defendant held under him. It was held, that the defendant was estopped to show title out of the judgment debtor, and if he had a written lease which would affect his rights, he should produce it without notice from the other party. *Jackson v. Jones*, 9 Cow. (N. Y.) 182.

In trespass to try title, where plaintiff and defendant claim through a common source, defendant can not question the validity of a link in the title prior to its vesting in the common source. *Evans v. Foster*, 79 Tex. 48; 15 S. W. Rep. 170 (1891).

But where both parties claim from a common source, plaintiff may introduce in evidence the title under which the defendant claims, without impairing his right to question the legal effect of such evidence. *Laidley v. Central Land Co.*, 30 W. Va. 505; 4 S. E. Rep. 705 (1888).

A purchaser is not estopped by acts of his grantor, of which he had no notice at the time of his purchase. *Rutz v. Kehr* (Ill.), 25 N. E. Rep. 957 (1891).

A purchaser of mortgaged property on execution sale is not estopped from

Johns. (N. Y.) 230; *Brandter v. Marshall*, 1 Cai. R. (N. Y.) 394; *Rowletts v. Daniel*, 4 Munf. (Va.) 473; *Jackson v. Croy*, 12 Johns. (N. Y.) 430; *Duvall v. Bibb*, 3 Call (Va.), 166; *Jackson v. Jackson*, 5 Cow. (N. Y.) 174; *Higginson v. Mien*, 4 Cranch (U. S.), 419; *Hall v. Doe*, 5 Barn. & A. 687.

denying the validity of the mortgage. *National Transit Co. v. Weston*, 121 Pa. St. 485; 22 W. N. C. 108; 15 Atl. Rep. 569 (1888).

Defendant entered into the possession of premises, claiming solely under a lease, and paid the rent named in the lease for nearly twenty years. *Held*, that he could not thereafter, while still holding possession, refuse to pay rent on the ground that he had no title to the premises, because the premises occupied by him did not exactly coincide by metes and bounds with the description in the lease. *Outtoun v. Dulin*, 72 Md. 536; 20 Atl. Rep. 134 (1890).

Where land was sold at execution sale, and the execution debtor in possession, leased the land to a third person after sale, the lessee can not set up the title of the vendee as a defense against the action of the lessor. *Wood v. Turner*, 8 Humph. (Tenn.) 685; *Crutsinger v. Catron*, 10 Ib. 24.

One in possession of land, as owner of an individual share, having accepted a lease of the other interest, may, without first giving up possession, assert an adverse title against the lessor in an action by the latter of trespass to try title, and for partition. *McKie v. Anderson*, 78 Tex. 207; 14 S. W. Rep. 576 (1891).

A testator devised his property to his widow for life, and directed that, upon her death, it should be sold by his executors, who, from the proceeds, should pay \$1,000 each to two of his grandchildren, and distribute the residue among testator's children, "or their heirs." One of the children conveyed her interest in the land, and then died before the termination of the life estates. *Held*, that her heirs were not estopped by the covenants in their ancestor's deed, since they took as devisees, and not as heirs. *Ebey v. Adams* (Ill.), 15 N. E. Rep. 1013; Am. Dig. 1891, 1597.

In an action for rent the tenant counter-claimed that, prior to the execution of the contract for rent, he held the fee to the land in controversy, and, in order to secure the landlord as surety upon a note given by him (tenant) to a third party, he had conveyed the land to the landlord by absolute deed, with the understanding that it was to be a mortgage, or that the land was to be held in trust till a sale could be effected. It was further averred that a sale had been made by the landlord, and that a balance was due the tenant after paying the note and the rent. *Held*, that the exclusion of evidence tending to show the real relation of the parties was error, since the rule which prevents a tenant from disputing his landlord's title can not be applied so as to preclude a grantor of land from showing that the deed was intended only as a mortgage, or to place land in trust. *Smith v. Smith*, (Tex.) 16 S. W. Rep. 637; Am. Dig. 1891, 2655.

When a defendant does not take the right to occupy premises under any agreement with plaintiff, nor in any way accept him as landlord, there is no estoppel to deny plaintiff's title. *Davis v. Delaware & Hudson Canal Co.*, 109 N. Y. 47; 15 N. E. Rep. 873 (1888).

A deed excepting "lot 6, block 36, heretofore conveyed to B.," does not estop the grantor from denying the conveyance to B., though the grantee may afterward have bought the lot from B. There is no estoppel by deed, because the recital is not material to the object of the conveyance; nor *in pais*, because the grantor did not intend, and was not bound to foresee, that the grantee would act on it. *Ambs v. Chicago, St. P., M. & O. Ry. Co.*, 44 Minn. 256; 46 N. W. Rep. 321 (1891).

The fact that a railroad company, under a misapprehension of its legal rights, accepted a deed of the right to construct its road over a person's ditch, and paid him therefor, does not estop it to deny afterward that he had any title that could be set up against its own. Affirming 26 Fed. Rep. 586; *Bybee v. Oregon & C. R. Co.*, 139 U. S. 663; 11 S. Ct. Rep. 641 (1891).

§ 2. **Who are Estopped to Deny Title.**—The general rule of law, that a person coming into possession of lands, tenements or hereditaments under the agreement or license of another, can not be permitted to deny the title of the latter when called upon to surrender it, is of almost universal application. Even if the person so coming into possession had a valid title at the time, he is deemed to have waived it, and as between the parties to have admitted the title in the person under whom he entered.¹

This doctrine, as it is called, of estoppel, is of most frequent application to persons occupying the position of tenants where the relation of landlord and tenant exists; but it applies equally to all persons sustaining similar relations, as vendor and vendee, mortgagor and mortgagee,² debtor and purchaser at execution sales,³ heirs and common ancestor,⁴ and the like.

In an action of ejectment for dower, where the defendant was purchaser, and entered into possession by virtue of a conveyance from the grantee of the husband, it was held that the defendant was estopped from showing that the husband had not title to the premises, and that he (the defendant), after his purchase from the grantee of the husband, on an action being brought against him by the real owner for the recovery of the land, had obtained, by purchase, the true and paramount title. *Bowne v. Potter*, 17 Wend. (N. Y.) 164.

§ 3. **The Relation of Landlord and Tenant.**—It is a fundamental rule of law governing the relation of landlord and tenant, that in all actions in law and in equity between them relating to the possession of the demised premises, the tenant is es-

¹ *Phelan v. Kelly*, 25 Wend. (N. Y.) 224; *Pershing v. Canfield*, 70 Mo. 140; 390 (1841); *Woodruff v. Detheridge*, 6 Lester v. Sherwin, 86 Ill. 420; *Jackson v. McGinness*, 14 Pa. St. 331.
J. J. Marsh. (Ky.) 368 (1831); *Sharp v. Kelly*, 5 Den. (N. Y.) 431 (1848); *Pope v. Harkins*, 16 Ala. 321; *Jackson v. Harper*, 5 Wend. (N. Y.) 246; 593.
O'Halloran v. Fitzgerald, 71 Ill. 53; *Gould v. Hendrickson*, 96 Ill. 599 (1880); *Weaver v. Lutz*, 102 Pa. St. 529 (1826); *Proprietors, etc., v. Battles*, 6 Vt. 395 (1834).
Galloway v. Ogle, 2 Binn. (Penn.) 468; *Bertram v. Cook*, 32 Mich. 518.

² *Jackson v. Ayers*, 14 John. (N. Y.)

topped from denying or assailing in any way the title of his landlord directly or indirectly.¹

A tenant in possession can not dispute his landlord's title. Following *School Dist. v. Long*, 10 Atl. Rep. 769. *Lebanon Female Seminary (Pa.)*, 12 Atl. Rep. 857 (1888).

A tenant can not, during his term, or during the possession taken or acquired under the lease, deny his landlord's title. *Pengra v. Munz*, 29 Fed. Rep. 830; *California & Oregon Land Co. v. Munz*, Id. 837 (1887).

A tenant in possession can not gain a title adverse to his landlord through a sale for taxes levied during the tenancy; especially if the taxes were upon improvements added by the tenant. *Williams v. Towl*, 65 Mich. 204; 31 N. W. Rep. 835 (1887).

In an action to recover land, plaintiff claiming as beneficiary under a trust deed, conditioned that plaintiff should support the grantor and his wife during life, and it appearing that defendant was in possession by permission of plaintiff's grantor, and defendant claiming possession for over thirty years, and also attempting to show a defect in the title of plaintiff's grantor, an instruction that if such grantor put defendant in possession, telling him it should be a home to him, and, further, if plaintiff complied with the provisions of the trust deed defendant would be the tenant of plaintiff, and estopped from disputing his title, is not open to an objection by plaintiff, as not sufficiently stating the law in reference to the defense of adverse possession. *Conwell v. Mann*, 100 N. C. 234; 6 S. E. Rep. 782 (1888).

While a tenant can not be permitted to controvert the title of his landlord under whom he entered into possession, yet if one in possession under claim of title is induced to accept a lease through misrepresentation, fraud, or trick of the lessor, he is not estopped from setting up a title superior to that of his lessor. So, if the lease be made through mutual mistake of the facts by both parties, the lessee is not estopped from setting up a superior title, if he was in possession when he executed the lease. *Berridge v. Glassey (Pa.)*, 7 Atl. Rep. 749 (1887).

A tenant may show that the title of his landlord under which he entered has passed by operation of law to a third party, and that he holds under the new owner. *Rhyne v. Guevara*, 67 Miss. 139; 6 So. Rep. 736 (1890).

¹ *Lamson v. Clarkson*, 113 Mass. 71; *Jones v. Dove*, 7 Oreg. 467; *Lyles* 348; *Tewksbury v. Magraff*, 33 Calif. 237; *Clarke v. Clarke*, 51 Ala. 493; *Grant v. White*, 42 Mo. 285; *Richardson v. Harvey*, 37 Ga. 224; *Cooper v. Smith*, 8 Watts (Penn.), 536; *Longfellow v. Longfellow*, 61 Me. 590; *Jackson v. McLeod*, 12 Johns. (N.Y.) 182; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Donald v. McKinnon*, 17 Fla. 746; *Cook v. Creswell*, 44 Md. 531; *Morrison v. Bassett*, 26 Minn. 235; *Love v. Law*, 57 Miss. 596; *Nolen v. Royston*, 36 Ark. 561; *Territt v. Cowenhoven*, 79 N. Y. 400; *Davis v. Davis*, 83 N. C. 71; *Murphy*, 38 Texas, 75; *Hatch v. Bullock*, 57 N. H. 15; *Bowdish v. Dubuque*, 38 Iowa, 341; *Walden v. Bodley*, 14 Pet. (U. S.), 156; *Doe v. Smythie*, 4 M. & S. 347; *Coppinger v. Armstrong*, 8 Ill. App. 210; *Hostetter v. Hykas*, 3 Brew. (Penn.) 163; *Tompkins v. Snow*, 63 Barb. (N. Y.) 525; *Barwick v. Thompson*, 7 T. R. 488; *Silvey v. Summer*, 61 Mo. 153; *Townsend v. Davis*, *Forrest*, 120; *Lucas v. Brooks*, 18 Wall. (U. S.) 456; *Stott v. Rutherford*, 92 U. S. 107.

It is a general rule, that a tenant is estopped by his lease to dispute the title of his landlord, but the rule is not without its exception. If the landlord's title has expired since the commencement of the lease, the tenant will not be estopped by his lease from showing that fact in answer to an ejectment against him by his landlord to recover possession. *England v. Slade*, 4 Term, 682; *Doe v. Ramsbottom*, 3 Maule & S. 347.

If a person in possession of land covenants with another person to pay him for the land, he thereby acknowledges the title of the other person and is estopped from setting up an outstanding title, or title in himself, unless he can show that he was deceived, or imposed upon, in making the agreement. *Jackson v. Ayers*, 14 Johns. (N. Y.) 224.

A landlord who brings his action against a tenant, is not required to prove his title, for the landlord's title is admitted by the tenant's taking the lease from him. And where rent has been paid to a tenant for life, the same rule applies. He will not be permitted to dispute the title of the reversioner. *Doe v. Whitroe*, Dow. & R. N. P. C. 1; *Rennie v. Robinson*, 1 Bing. 147; *Tilghman v. Little*, 13 Ill. 239.

If the tenant, after renting the premises, acquires rights adverse to his landlord, he is bound to surrender the property before he can be permitted to assert them. *Brown v. Keller*, 32 Ill. 151; *Russell v. Titus*, 3 Grant's Cases (Penn.), 295.

§ 4. The Doctrine Applied to Persons in Possession Under Tenants.—The same principle which forbids a tenant to dispute the title of his landlord, applies to any person who may acquire the possession from, through or under the tenant. If by collusion with the tenant or through other means, he is induced to vacate and surrender the possession to a stranger, such person will acquire no greater rights than the one who occupied as a tenant. This rule of law is founded in justice, and any departure from it would prove disastrous to the rights of land holders, especially where titles are defective, and would be of no practical benefit to the occupant, unless it might aid a designing and dishonest person to take advantage of his position to turn over the land occupied by him to some one who had a conflicting title in the premises. Courts are not, however, organized to encourage the reckless and dishonest, or to assist them in their dishonest schemes.*

§ 5. The Rule Applies to a Subtenant.—While a tenant is in possession of demised premises he is estopped from denying his landlord's title, and the same rule applies to a subtenant or one coming into possession under a tenant;² but the estoppel only continues so long as the lease continues and for any

¹ *Hardin v. Forsythe*, 99 Ill. 320 (1880). ² *Bertram v. Cook*, 44 Mich. 396; 6 N. W. Rep. 176 (1880).

further time while the tenant or subtenant may hold over.¹ If either of them first surrender the possession obtained or enjoyed by means of the tenancy, he is then as free to dispute the landlord's title and to set up an independent right in himself as any other person.²

§ 6. **The Reason for the Rule.**—The doctrine that the tenant is estopped from denying his landlord's title originates in the relation between lessor and lessee, and so far as respects them is well established, and ought to be maintained. The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He can not be allowed to controvert the title of the lessor without disparaging his own, and he can not set up the title of another, without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing and in full operation.

In considering this subject, we ought to recollect, too, the policy of the times in which this doctrine originated. It may be traced back to the feudal tenures, when the connection between landlord and tenant was much more intimate than it is at present—when the latter was bound to the former by ties not much less strict nor not much less sacred than those of allegiance itself.³

§ 7. **Exceptions to the Rule.**—But while the rule is well established that a tenant can not dispute the title of his landlord, or set up an adverse title, he may, however, show that the title of the landlord has terminated, that the landlord has

¹Newton v. Roe, 33 Ga. 163; Lowe inson, 1 Neb. 3; Bertram v. Cook, v. Emerson, 48 Ill. 160; Abbott v. 44 Mich. 396.

Crowmartie, 72 N. C. 290; Hughs v. ²Fuller v. Sweet, 30 Mich. 237; Watts, 28 Ark. 153; Longfellow v. Page v. Kinsman, 43 N. H. 228; Bertram v. Cook, 44 Mich. 396.

Longfellow, 61 Me. 590; Bremer v. ³Marshall, C. J., in Bright's Lessee Bigelow, 8 Kan. 497; Prevott v. Lawrence, 51 N. Y. 519; Phelps v. Taylor, 23 La. Ann. 585; Matlis v. Rob- v. Rochester, 7 Wheat. (U. S.) 535 (1822).

conveyed to another, or that his title has been sold on execution, and in that manner passed into other hands. The tenant may purchase, himself, of the landlord, and in such a case he is under no obligation to surrender the possession back to the landlord; but should the landlord, after a conveyance to the tenant, undertake to recover the possession from the tenant, the tenant may defeat a recovery by showing a purchase and conveyance of the property. The same principle will apply where a stranger succeeded to the possession of the tenant, and then obtained a deed from the landlord. He would, in such a case, be under no obligation to restore the possession to the landlord, but the deed of the landlord would be a sufficient protection as against any action the landlord might bring to recover possession of the premises.¹

§ 8. **When the Landlord Parts with His Title, etc.**—When the landlord conveys his title to his tenant, the latter is not bound to restore possession to his landlord and then resort to an action to regain possession. By receiving a deed from his landlord, the relation of landlord and tenant ceases, and the tenant then is in and holds as grantee, and he is in under the same title under which he entered. When a landlord conveys to a stranger, and it can not matter whether the landlord makes a voluntary conveyance, or the premises are sold under execution against the land, so that the title is effectually passed, the tenant is not bound to restore possession to his landlord, but may attorn to his grantee. In doing so he does not dispute his landlord's title, but fully recognizes and submits to it. After such a conveyance the tenant may attorn to the grantee, and if sued by his former landlord for possession he may set up his deed to his grantee to defeat a recovery.

The landlord becomes as fully estopped by such a conveyance as was the tenant by receiving the lease under which

¹ *Hardin v. Forsythe*, 99 Ill. 320 acknowledgment. *Jackson v. Hopkins*, 12 Wend. (N. Y.) 105. A lessee, lands, acknowledging the title of another, is not estopped from subsequently disclaiming, holding under such title, if the original entry was not under the person in whom the title is acknowledged; nor is any other person, deriving the possession from such tenant, estopped by such

upon eviction under a paramount outstanding title, who has attorned to the true owner, is not estopped from setting up the eviction, and the title under which the eviction was had, as against the claim of his lessor. *Kane Co. v. Herrington*, 50 Ill. 232.

he entered. A defendant has a right to show that his landlord has conveyed the title under which he entered, to himself or another, and that such landlord, or his grantees, are estopped to assert the title against him.¹

§ 9. **Vendor and Vendee.**—When a person enters into the possession of lands as a vendee under an executory contract of purchase and neglects to pay the purchase money or otherwise fails to comply with the terms of the contract, and the vendor brings ejectment against him for the recovery of the possession of the lands, he can not dispute the title of his vendor, either in a direct proceeding or by indirectly setting up an outstanding title in a third person.²

A vendee who accepts title and makes part payment, according to the terms of an agreement between the vendor and the broker through whom the sale is made, is estopped to afterward deny the broker's authority to make the agreement. *Seymour v. Slide & Spur Gold Mines*, 42 Fed. Rep. 633 (1891).

§ 10. **The Doctrine of Doubtful Application.**—The propriety of applying this doctrine to the case of vendor and vendee, except in cases where the vendee enters under an executory contract of purchase, and fails to comply with the terms of the contract, has been doubted.

The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he is called upon in consequence of some covenant of warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that

¹ Walker, J., in *Franklin v. Palmer*, 389; *Nellis v. Lathrop*, 22 Wend. (N. 50 Ill. 202 (1869); *Moffat v. Strong*, 9 Y.) 121; *Downs v. Cooper*, 1 Gale Bosw. (N. Y.) 57; *Agar v. Young*, 1 & D. 573; 2 Ad. & E. (N. S.) 256. Car. & M. 78; *Wells v. Mason*, 4 ² *Jackson v. Ayers*, 14 Johns. (N. Scam. (Ill.) 85; *Marley v. Rogers*, 5 Y.) 224; *Sanford v. Cloud*, 17 Fla. Yerg. (Tenn.) 217; *Moore v. Beasley*, 3 557; *Galloway v. Finley*, 12 Peters Ham. (O.) 294; *Hilton v. Bender*, 2 (U. S.), 264; *Pershing v. Canfield*, 70 Hun (N. Y.), 1; *Hoag v. Hoag*, 35 N. Mo. 140; *Leshar v. Sherwin*, 86 Ill. Y. 469; *Bigler v. Furnham*, 58 Barb. 420; *Fitzgerald v. Spain*, 30 Ark. 95; (N. Y.); *Jones v. Clark*, 20 Johns. (N. Hill v. Winn, 60 Ga. 337; *Bush v. Y.)* 51; *Langdon v. Watson*, 2 Starkie, Marshall, 6 How. (U. S.) 284; *Love v. 230; Jackson v. Vincent*, 4 Wend. (N. Edmonston, 1 Ired. (N. C.) L. 152; Y.) 633; *Syburn v. Slade*, 4 T. R. 682; *Strong v. Waddell*, 56 Ala. 471; *Jack- Neave v. Moss*, 1 Bing. 360; 8 Moore, son v. McGinness, 14 Pa. St. 331.

title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor, respects the payment of the purchase money. How far he may be bound to this by law, or by the obligations of good faith, is a question depending on all the circumstances of the case, and in deciding it, all those circumstances are examinable.

If the vendor has actually made a conveyance, his title is extinguished in law as well as in equity, and it will not be pretended that he can maintain an ejectment. If he has sold, but has not conveyed, the contract of sale binds him to convey, unless it be conditional. If after such a contract, he brings an action of ejectment for the land, he violates his own contract, unless the condition be broken by the vendee; and if it be, the vendor ought to show it.¹

§ 11. **Debtor and Purchaser at Execution Sale.**—The general rule is that a purchaser at a sheriff's sale comes into exactly such estate as the debtor had, and when the debtor is sued in ejectment by the purchaser under the execution, to recover possession, he can not dispute the plaintiff's title. An exception to the rule is, that if, after the sale, the defendant in execution abandons the land, and afterward returns to it and is sued in ejectment, he may show an outstanding title, provided he shows he has taken possession and holds under it, and the same rule applies to a purchaser holding under the defendant in execution.²

A plea in ejectment that plaintiff was attorney for the creditor in an attachment suit against P., that defendant claims under one S., and has acquired all of his rights in the premises, that S. was the purchaser at the sale under the attachment proceedings and purchased relying upon the acts of the creditor in attaching and selling the property, as a declaration that P. was, and that the creditor was not, the owner of the property, and that plaintiff acquired his deed from the creditor with notice, etc., does not contain a single element of an estopped *in pais*. *Blodgett v. Perry*, 97 Mo. 263; 10 S. W. Rep. 891 (1889).

§ 12. **Heirs Deriving Title from a Common Ancestor.**—The rule of the estoppel applies equally to all cases in which

¹ Marshall, C. J., in *Bright's Lessee* (1880); *Weaver v. Lutz*, 102 Pa. St. v. Rochester, 7 Wheat. (U. S.) 535 593; *Collier v. Pfening*, 34 N. J. Eq. (1822); see Chapter VII, §§ 2, 9. 22.

² *Gould v. Hendrickson*, 96 Ill. 599

the defendant is a co-heir and tenant in common with the plaintiff, or when the parties claiming as plaintiffs are holding under the plaintiff's co-heirs, and he can not be permitted to dispute the title of the common ancestor, or show that he is not a tenant in common, but holds in his own right.¹

Where one takes by descent as a co-heir and tenant in common, in ejectment by his co-heir, or one claiming under him, he can not show that the ancestor had no title. *Jackson v. Streeter*, 5 Cow. (N. Y.) 529 (1826).

Where a parent, having a possessory title to lands, dies in possession, leaving several children, his heirs at law, who succeed to such possessions, it is not competent for one or more of such heirs, who have obtained the exclusive possession of the whole of the premises, to defeat a recovery by their co-heirs of their proportional parts or shares, by setting up a title acquired from the owners of the land; to avail themselves of such title, they must first surrender possession to their co-heirs and then bring ejectment. *Phelan v. Kelly*, 25 Wend. (N. Y.) 389.

A defendant in ejectment, who introduces conveyances from plaintiff's ancestor to his predecessor in title, is not thereby estopped from disputing such ancestor's title to all the lands, especially where he has been long in possession. But he can not claim part of the lands under, and part against, the same title. *Cummings v. Powell*, 97 (Mo.) 524; 10 S. W. Rep. 819 (1889).

An heir is not estopped from claiming land which his ancestor had fraudulently conveyed with covenants of warranty, where the heir has never accepted the succession of his ancestor, and does not claim title through him. *Modifying* 43 Fed. Rep. 215. *Brewer, J., dissenting.* *City of New Orleans v. Whitney*, 11 S. Ct. Rep. 423; 133 U. S. 595; *Whitney v. City of New Orleans, Id.* (1891).

Land was given by a father to his daughter as dotal property. She joined her husband in a sale to her mother in consideration of advances the latter had made to him, which were subsequently repaid. She was coerced by her husband in making this sale. She remained in possession, and her mother made to her a donation *inter vivos* of the land. She sold parts of it, the deeds reciting that she had received the land by donation from her mother. A suit for a separation of property was brought in her name, in which she obtained a money judgment against him for the appropriation of her dotal and paraphernal property. This judgment was never executed, and the suit was brought and prosecuted without her knowledge. *Held*, that the land must be collated in the succession of the father, and not in that of the mother, and that the daughter was not estopped from denying that it was a donation from the mother. *Succession of Toledano*, 42 La. Ann. 914; 8 So. Rep. 604 (1891).

In an action to recover land, defendant answered that a third person was previously in possession thereof adversely to plaintiff; that on plaintiff's representation that he was the sole heir of the owner, such third person went into possession under plaintiff, upon contract for purchase; that defendant succeeded to this contract upon like representations made by

¹ *Jackson v. Streeter*, 5 Cow. (N. Y.) 529 (1826); *Phelan v. Kelly*, 25 Wend. (N. Y.) 393 (1841).

plaintiff to him; that in fact plaintiff was one of several heirs, and only the owner of an undivided one-third interest. *Held*, that defendant was not estopped to deny plaintiff's title, and it was error to strike out the answer. *Hammers v. Hanrick*, 69 Tex. 412; 7 S. W. Rep. 345 (1888).

Plaintiffs are estopped from claiming land as heirs of their father, where he for many years acted as the agent of another party in collecting and accounting for the rents of such land, and allowed the land to be sold under various decrees without ever asserting title thereto. *Alexander v. Bourdier*, 43 La. Ann. 321; 8 So. Rep. 876 (1891).

§ 13. Between Mortgagor and Mortgagee.—The doctrine of estoppel also applies where the action is between a mortgagor and his mortgagee or their privies or assigns.¹

Where a party accepts a mortgage which recites a first mortgage, and provides for its payment, he thereby estops himself to deny the existence of that mortgage, and the validity of its lien. *Clapp v. Halliday*, 48 Ark. 258; 2 S. W. Rep. 853 (1887).

The mortgage under which plaintiff in ejectment claimed title conveyed lands which defendant (the mortgagor) had received in exchange for his homestead, and on which he was building and intended to move, and was joined in by a woman whom he had married supposing himself legally divorced from his former wife, who had deserted him. Having subsequently discovered that he was not divorced he renewed proceedings, and obtained a decree three days after the expiration of the time for redemption from a foreclosure sale. *Held*, that defendant could not be heard to say that the mortgage conveyed his homestead, and was void because not signed by his wife. *Trout v. Rumble*, 82 Mich. 202; 46 N. W. Rep. 367 (1891).

On a bill to foreclose a mortgage containing covenants of seizin and special warranty, the mortgagor can not set up a prior and paramount equitable title in himself. *McManness v. Paxson*, 37 Fed. Rep. 296 (1889).

Code Ga., § 2966, provides that "one who silently stands by and permits another to purchase his property without disclosing his title is guilty of such fraud as estops him from subsequently setting up such title against the purchaser." A. executed a mortgage to B. to secure her on a note, and thereafter died. At maturity of the note, plaintiffs, as the deceased mortgagor's executors, tried to borrow money to pay the note, and failed, whereupon B. paid the note, advertised the property under the power of the sale in the mortgage, and sold it. Two of plaintiffs were present at the sale, and made no objections. The purchaser, as the agent of the mortgagee, drew the notice of sale, and was a brother of deceased mortgagor in possession of the facts of title. *Held*, that the plaintiffs were not estopped from contesting the validity of the sale. *Wilkins v. McGehee*, 86 Ga. 764; 13 S. E. Rep. 84 (1891).

§ 14. Application of the Estoppel.—The estoppel applies only to the estate or title and not to the persons owning or holding it, so the tenant or person holding a similar position

¹ *Wilson v. Hooper*, 13 Vt. 653; *Ly-Wadsworth*, 2 Ired. (N. C.) 263; *Kuchman v. Mower*, 6 Vt. 345; *Fuller v. Hall*, 1 Doug. (Mich.) 21.

is estopped to deny only the title under which he takes possession. The rule does not prevent him from acquiring a title to be asserted after the determination of the relation or privity of title existing between him and the person under whom he entered into possession of the premises and the re-delivery of the possession of the land.¹

§ 15. **The Extent of the Estoppel.**—The estoppel, when a relation similar to that of landlord and tenant exists, extends not only to the tenant or person occupying a similar position, but to all persons holding through, by, or under him. It is a well known rule in the law of nature that the stream can not rise above its source, so he who takes his title from another and holds under him admits the source of his title and is estopped from denying it as against the person under whom he holds. If he assigns his title he can carry no better title than he has, and his assignee is in no different or better position. In an action of ejectment against him the same estoppel operates upon him as would have operated upon his assignor had he been the defendant and no assignment made. He can not deny the plaintiff's title nor can he plead an outstanding title in a third person to defeat the action.²

§ 16. **Fraud, Misrepresentation, etc., Destroys the Estoppel.**—It is a general rule of law that fraud vitiates all contracts in the consummation of which it enters. The relation of landlord and tenant rests upon a contract, either expressed or implied, to pay rent and to re-deliver the possession to the landlord at the expiration of the term. In this relation, as we have seen, the landlord may rely upon the estoppel for the protection of his title; but in case the tenant has been induced to enter into the relation by fraud or misrepresentation the estoppel does not apply.³

In order to dispute his landlord's title in an action for rent, and set up his own against it, the tenant must first show that he accepted the lease in mistake, or that he was induced to accept it under such circumstances as would justify a court of equity in setting it aside. *Williams v. Wait* (S. D.), 49 N. W. Rep. 209 (1891).

¹ *Nims v. Sherman*, 43 Mich. 45; *Johnson v. Chely*, 43 Calif. 300; *Williams v. Garrison*, 29 Ga. 503. *Miller v. Bonsadon*, 9 Ala. 317; *Higgins v. Turner*, 61 Mo. 249; *Turpin v. Withereil*, 14 Kan. 616.

² *Raley v. Ross*, 59 Ga. 862; *O'Brien v. Saunders*, 32 Gratt. (Va.) 27-33; *Mountnoy v. Collier*, 1 E. & Bl. Alderson v. Miller, 15 Gratt. (Va.) 630; *Schultz v. Arnot*, 33 Mo. 172; 279.

When a party in possession as owner makes a deed to another, and takes from him a lease of the demised premises, agreeing to pay rent, and to surrender the same upon the expiration of the term, he cannot, in an action by the landlord to recover possession, without first impeaching the validity of the lease, controvert the landlord's title by evidence that he made the deed under the coercion of menace and duress. *Williams v. Wait* (S. D.), 49 N. W. Rep. 209 (1891).

The mere fact that the tenant has a better title than his landlord does not alone raise the presumption that the lease was a fraud or accepted by mistake. *Williams v. Wait* (S. D.), 49 N. W. Rep. 209 (1891).

In an action of unlawful detainer by the landlord against the tenant, where neither fraud nor mistake is shown in the procurement of the lease, no proof of title is required by the landlord, for in such case the tenant is estopped from denying the title of his landlord. *Voss v. King*, 33 W. Va. 236; 10 S. E. Rep. 402 (1889).

A party in possession of lands recognizing the title of a claimant, and agreeing to purchase, may subsequently deny such title, set up title in himself, and show that his recognition of the title was induced by imposition or made under a misapprehension of his rights; but a party entering into possession under an agreement to purchase can not dispute the title of the person under whom he enters until after a surrender of the possession. *Jackson v. Spear*, 7 Wend. (N. Y.) 401.

The landlord's title may be disputed where it was acknowledged under a misapprehension by a party already in possession as the tenant of another. *Swift v. Dean*, 11 Vt. 323; *Borland v. Box*, 62 Ala. 87.

And the same rule applies where an attornment is superinduced by the misrepresentations of the landlord. *Tison v. Yawn*, 15 Ga. 491; *Gallagher v. Bennett*, 38 Tex. 291; *Evans v. Bidwell*, 76 Pa. St. 497; *Jenckes v. Cook*, 9 R. I. 520.

And where the plaintiff has received rent from the defendant by mistake or under a false claim of title. *Anderson v. Smith*, 63 Ill. 126; *Schultz v. Arnot*, 33 Mo. 172.

It has been held that an agreement by a party in possession to abandon the premises at a certain day is not a lease, and does not estop him from assailing the title of the landlord. *Miller v. McBrier*, 14 S. & R. (Penn.) 382.

And so, where, by the exhibition of a title founded in forgery, the party in possession was induced to accept the lease, the facts may be shown. *Miller v. McBrier*, 14 S. & R. (Penn.) 382.

If a tenant is induced, by the false representations of a stranger claiming to be the owner of the demised premises, to attorn to him, the landlord, defending with the tenant in ejectment, will not be estopped from denying the title of such stranger. *Schultz v. Arnot*, 33 Mo. 172.

It must be borne in mind, however, that the tenant, in refusing to surrender possession of the demised premises, on the ground that his landlord falsely represented himself to be the owner of the property, must prove not only the false representation, but that he was induced, by the fraud, to accept the lease. *Camarillo v. Fenlon*, 49 Calif. 202.

It has been held that even the payment of rent to the original landlord, after his title is expired, does not conclude the tenant, if the payment was

made in ignorance of the nature of the landlord's title. *Fenner v. Duplock*, 2 Bing. 10.

In Pennsylvania, where it appeared that the defendant had not paid any part of the purchase-money, or made any valuable improvements, it was held that the defendant could not set up the weakness of the vendor's title in defense of his possession. Unless fraud had been practiced on him he must pay the purchase-money or relinquish possession. He can not set up an outstanding title in another, or adverse title in himself. *Jackson v. McGinness*, 14 Pa. St. 331.

CHAPTER XIX.

DAMAGES AND MESNE PROFITS.

- § 1. Damages—Meaning of the Term as Herein Used.
- 2. Mesne Profits—The Term Defined.
- 3. What are Mesne Profits—Illustrations.
- 4. Measure of Damages—Rule for Estimating Mesne Profits.
- 5. The Subject Discussed.
- 6. Damages—The English Rule.
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- 8. Rules for Estimating Mesne Profits.
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- 10. Mesne Profits—When Not Allowed.
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- 50. Costs of the Ejectment as an Element of Damages.
- 51. Costs as Damages.
- 52. Counsel Fees and Other Like Expenses.
- 53. Abatement and Revivor.

§ 1. **Damages.**—Under the general head of “Damages,” we propose to discuss in this chapter the compensation which the successful plaintiff in an action for the recovery of real property is entitled to by reason of the withholding of the property from him by the defendant, and the rules of law pertaining to or governing the proceedings in which such compensation is to be recovered.

Properly speaking, this compensation is designated as mesne profits, and the action in which it is recovered is usually an auxiliary or subsidiary proceeding to the action of ejectment.

§ 2. **Mesne Profits—The Term Defined.**—Mesne profits are the rents and profits, or the value of the use and occupation of the real property recovered in an action of ejectment during the period the property has been wrongfully withheld. These profits consist of the net rents which the owner might, with reasonable diligence, derive, after deducting all necessary repairs and taxes. It has the same meaning in law as the phrase “The value of the rents and profits.”¹

§ 3. **What are Mesne Profits—Illustrations.**—Whatever would be rent, as between landlord and tenant, is mesne profits as between the parties in ejectment.² But these profits frequently include matters which would hardly be termed rent

¹ Wallace, etc. v. Berdell et al., 101 (N. Y.), 328; Nash v. Sullivan, 32 N. Y. 13; 3 N. E. Rep. 769; 1 Steph. Minn. 189.

Comm. 294; Leland v. Tousey, 6 Hill ² Morris v. Tinker, 60 Ga. 466.

as between landlord and tenant; as, where the defendants were ousted from lands occupied by them in good faith under color of title, and upon which they had expended large sums of money in developing mines and making permanent improvements, they were charged only with the value of the ore in place, which was ascertained by deducting from the market value of the ore the cost of mining, cleansing and delivering it in market.¹ So the receipts of a ferry, deducting the expenses of fitting it up and running it, in an action to recover mesne profits from an unsuccessful defendant, were held the proper amount to be recovered.² But in an action to recover the possession of a mill site upon which was a saw mill, the mesne profits were held to embrace the rent of the mill and of the site together, as one premises and as realty, in estimating the amount to be recovered.³

§ 4. **Measure of Damages, or Rules for Estimating Mesne Profits.**—When ejectment proceedings were fictitious and the plaintiff merely nominal, the damages recoverable in the action was nominal, and the plaintiff was compelled to resort to a subsequent action to recover his damages, generally known in the law as mesne profits. But now, by the statutes in nearly, if not all of the States, the claim for mesne profits may be treated as a part of the original cause of action, and recovered in the same suit as damages for the withholding of the possession of the premises in question. The general principle upon which these damages are allowed is that the plaintiff is entitled to recover all the damages fairly resulting from his having been wrongfully kept out of possession. Compensation is the measure of damages. Hence, on principle, and according to the weight of authority, the amount of recovery for mesne profits is the annual value of the premises wrongfully withheld from the time the plaintiff's title accrued, not exceeding, however, the period fixed by the statute of limitations.⁴

Damages, as a compensation for rents and profits, in an action of trespass to try title, in Alabama, can only be computed from the time when the title was *cast* upon the plaintiff. *Brewster v. Buckholts*, 2 Ala. 20.

¹ *Ege v. Kille*, 84 Pa. St. 333.

² *Averette v. Brady*, 2 Ga. 523;
Dunlap v. Yoakum, 18 Tex. 582.

³ *Morris v. Tinker*, 60 Ga. 466.

⁴ *Nash v. Sullivan*, 32 Minn. 189; 20
N. W. Rep. 144 (1884); *Tongue v. Nut-*

well, 31 Md. 302 (1869); *Hill v. Mey-*
ers, 46 Pa. St. 15 (1863); *Morrison v.*
Robinson, 31 Pa. St. 456; *New Orleans*
v. Gaines, 15 Wall. (U. S.) 624; *Van-*
devoort v. Gould, 36 N. Y. 639.

If defendant would end suit and prevent recovery of damages for a longer period of occupancy, he should make disclaimer in open court, or in some other manner, and yield possession to the plaintiff. *Bumpass v. Webb*, 2 Ala. 109.

Damages in trespasses to personal property are usually very easily measured by the value of the property at the time it was taken or destroyed, or by the degree of impairment of its value. But it is not so with real property withheld from the rightful owner, for it is entirely different in its character. Generally, land is not exclusively adapted to any one special use, like most articles of personal property, but may be turned to all imaginable uses, and its condition indefinitely altered at the pleasure of its occupant. Out of these changes of use and condition often arise very complicated questions, in the estimation of damages. *Morrison v. Robinson*, 31 Pa. St. 456.

In an action to recover mesne profits, plaintiff may either prove the profits actually received, or the annual rental value of the land. *Worthington v. Hiss*, 70 Md. 172; 19 Md. L. J. 919; 16 Atl. Rep. 534 (1889).

Where plaintiff recovers lots in the Hot Springs Reservation which were awarded to defendant by the commissioners appointed under Act of Congress March 3, 1887, to settle titles in the reservation, defendant, having held in good faith under the award, will not be charged with the rental value of the premises, but only with the actual receipts from the property. *Lawrence v. Rector*, 137 U. S. 139; 11 S. Ct. Rep. 33 (1890).

In an action for mesne profits of vacant, unimproved city lots, the defendant, a *bona fide* purchaser, can not be required to account for more than such rental value as he might fairly have obtained during the time of the ouster by a lease of premises from year to year in their unimproved condition. *Worthington v. Hiss*, 70 Md. 172; 16 Atl. Rep. 534 (1889).

§ 5. **The Subject Discussed.**—The measure of compensation under discussion has been involved in much confusion by the technical character of our forms of action.¹ Trespass being an action of tort, evidence in aggravation of damages is competent; hence, in one sense of the term, it is proper to say that the damages are largely under the control of the jury. But the cause of action does not necessarily contain the elements of a trespass. The possession of the premises may have been withheld and the rents and profits received by the defendant in the utmost good faith. In such cases the rule of law allowing the jury, in their estimate of damages, to go beyond the actual value of the income does not seem to be a good one.²

§ 6. **Damages—The English Rule.**—The amount of the damages must be proved; and as the action for mesne profits is an action of trespass *vi et armis*, the jury are not confined in their verdict to the mere rent of the premises, although the action is said to be brought to recover the rents

¹ Sedgwick on Damages, 260.

² See 1 Sedgwick on Damages, 260; *Alexander v. Herr*, 11 Pa. St. 537.

and profits of the estate, but may give such extra damages as they may think the particular circumstances of the case may demand.¹

The action for mesne profits may be brought pending a writ of error in ejectment, and the plaintiff may proceed to ascertain his damages, and to sign his judgment; but the court will stay execution until the writ of error is determined. *Adams on Ejectment*, 447; *Harris v. Allen*, *Cas. Prac. C. P.* 46; *Donford v. Ellis*, 12 *Mod.* 138.

§ 7. **A Rule Deduced from Modern Authorities.**—Under the modern authorities compensation is the true measure of damages in actions for mesne profits. The recovery of the plaintiff is limited to a reasonable compensation for the injury sustained, and the defendant is no longer at the mercy of the jury. Proof of the loss sustained must be furnished as in other cases, and, as in other cases, the verdict must be sustained by the evidence. The action is no longer treated as sounding in tort, but rather as one founded upon an implied contract.²

A verdict for mesne profits can not be upheld where there is no evidence to sustain it. *Brown v. Colson*, 41 *Ga.* 42; *Eaton v. Freeman*, 58 *Ga.* 129; *Mooring v. Campbell*, 47 *Tex.* 37; *Alexander v. Herr*, 11 *Pa. St.* 537.

Where there is no conflict of evidence as to the rental value of the land, and the jury, having found for the plaintiff for the land, failed to bring in any verdict for the damages, the judgment was reversed on the ground that it did not conform to the uncontradicted testimony. *Duncan v. Jackson* 16 *Fla.* 338.

§ 8. **Rule for Estimating Mesne Profits.**—In estimating the amount of mesne profits it would be manifestly unjust to confine the owner of the property withheld to the rents actually received by the party required to make restitution. The owner should have either the rents actually received, or the rental value, as may be just under the circumstances of each particular case. In either case payment necessarily made for taxes and ordinary repairs would be involved in ascertaining the rents received, or the rental value. The mesne profits consist of the rent, after deducting all necessary repairs and taxes, or the net rental value of the use and occupation; that is, all of which the party from whom the possession is withheld has been deprived. For this he should be made whole, and he should not suffer from any mismanagement, negligence,

¹ *Adams on Ejectment*, 459.

(*U. S.*) 349; *Averette v. Brady*, 20 *Ga.*

² *Morrison v. Robinson*, 31 *Pa. St.* 523; *Balling v. Lersner*, 26 *Gratt.* 456; *Cutter v. Waddingham*, 33 *Mo.* (Va.) 36; *Kille v. Ege*, 82 *Pa. St.* 107. 269; *Campbell v. Brown*, 2 *Woods*

or improvident expenditure by the party in possession. On the other hand, he should not be relieved from any necessary diminution of the gross rents or rental value, or gross value of the use and occupation, to which he would have been himself subjected had he not been disturbed in his possession. The amount justly chargeable for the rents, which the owner derived, or might with reasonable diligence have derived, from the property, and the amount of the expenditures which have been properly made, and which the owner would have been obliged to make had he remained in possession, are matters of fact to be determined by the court or jury, as the case may be.¹

§ 9. **The Bar of the Statute of Limitations.**—By the practice of the English courts, after a recovery in an action of ejectment, the plaintiff brought an action of trespass to recover mesne profits. This action could only be maintained on a recovery in ejectment, and hence was grafted on or grew out of that proceeding. By an action of ejectment at the ancient common law, the plaintiff only recovered damages and not the possession. But in the time of Henry VII it became the practice to recover the term, and it then became a real action and only nominal damages were recovered.² To the action for mesne profits, the defendant might plead the statute of limitation, that the action did not accrue within six years after suit was brought.³ The rules governing the action seem to have been the same as in any other action of trespass *quare clausum fregit*. In Buller's *Nisi Prius* it is said that "the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years," and the same rule is announced by Chitty,⁴ reference being made to Buller's *Nisi Prius*. Thus it is seen that under the practice in the British courts, the statute of limitations barred a recovery of mesne profits accruing more than six years before such action was brought.

¹ Wallace, etc. v. Berdell et al., 101 61 N. Y. 382; Adams on Ejectment, N. Y. 13; 3 N. E. Rep. 769; Hodgkins 459.

v. Price, 141 Mass. 162; 5 N. E. Rep. 502; Morrison v. Robinson, 31 Pa. St. 456; Sedgwick on Damages (7th Ed.) 2 Sellon's Prac. 37.

251; New Orleans v. Gaines, 15 Wall. 88. ³Sellon's Prac. 144; Buller's N. P.

(U. S.) 624, 632; Vandevort v. Gould, ⁴Buller's N. P. 88.

36 N. Y. 639; Woodhull v. Rosenthal, ⁵Chitty's Pleading, 225.

The practice in the American courts is not uniform, but after a careful examination we are unable to discover any substantial difference between the action of trespass for mesne profits as it existed at common law and is practiced in many of the States, or by the suggestion of mesne profits as required in others. The one is trespass, the others in assumpsit. In both there is a new service of process, a new declaration, pleadings, trial and judgment. They differ in form but not in substance.¹

In Illinois a proceeding called "suggestion of damages" has been substituted for the English action of trespass. We quote the statute as an illustration:

§ 43. Instead of the action of trespass for mesne profits, the plaintiff seeking to recover such damages shall, within one year after the entering of the judgment, make and file a suggestion of such claim, which shall be entered, with the proceedings thereon, upon the record of such judgment, or be attached thereto as a continuation of the same.

§ 44. Such suggestion shall be substantially in the same form as is now in use for a declaration in an action of assumpsit for use and occupation, and the same rules of pleading thereto shall be observed as upon declarations in personal actions.

§ 45. The defendant shall, upon the filing of such suggestion, be summoned in the same manner as in other actions.²

In an action brought under this statute and in which an appeal was taken to the Supreme Court, Mr. Justice Walker in delivering the opinion of the court, said: "At common law the action for mesne profits was regularly brought as any other action of trespass, while our statute has changed it to assumpsit. We are unable to procure any substantial difference between the action of trespass for mesne profits as it existed at common law and the suggestion under our statute. The proceeding has all the essential characteristics of a new suit which must be commenced within one year from the recovery in the suit of ejectment, and being substantially a new suit, all pleas in bar of its maintenance should be framed with that view, and the difference of the bar of the statute of limitations should relate to and be governed by the commencement of proceedings under the suggestions."³

The plaintiff is entitled to recover damages from the time of the demise, as laid in the declaration or complaint in the ejectment suit, although a period

¹ Ringhouse v. Keener, 63 Ill. 230 (1872).

³ Walker, J., in Ringhouse v. Keener, 63 Ill. 230 (1872).

² R. S. Ill. 1889, 600; Laws Ill. 1872, 376.

of more than six years be covered; provided the defendant has not pleaded the statute of limitations. *Ainslie v. The Mayor, etc.*, 1 Barb. (N. Y.) 168; *Jackson v. Wood*, 24 Wend. (N. Y.) 443. So also in Pennsylvania, mesne profits cannot be recovered beyond six years, or the limitation of an action of trespass. *Hill v. Meyers*, 46 Penn. 15.

The general rule, in trespass for mesne profits, is, that the plaintiff shall recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years, in which case the statute of limitations may be pleaded. *Hare v. Furey*, 3 Yates (Pa.) 13.

Where a defendant in ejectment, who has been evicted by *habere facias possessionem*, is afterward restored to possession by writ of restitution, he is liable to an action of mesne profits, from the original eviction, if the writ of restitution is quashed. *Trabue et al. v. Kellar*, 3 Marsh. (Ky.) 518.

The mesne profits recoverable in ejectment under Code Civil Proc. N. Y., § 1531, "for a term not exceeding six years," are to be assessed for the six years immediately preceding the trial, and not for the six years preceding the bringing of the action and also for the period intervening between that date and the date of recovery. *Gas Light Co. v. Rome, W. & O. R. Co.*, 51 Hun, 119; 5 N. Y. Sup. 459 (1889).

It is the rule in Louisiana that the liability of a disseizor to account for rents and revenues must be restricted to the time he was in possession, the rule of the civil law to the contrary never having been adopted there, and he can not be held primarily liable for rents accruing during the possession of his grantee. *City of New Orleans v. Christmas*, 131 U. S. 220; 9 S. Ct. Rep. 745; *Same v. United States*, Id. 755 (1889).

Defendant entered upon land by license of the owner, which was revoked by his death, but defendant still retained the possession. *Held*, proper to allow as damages the mesne profits from the time of the death. *Watson v. Chicago, M. & St. P. Ry. Co.* (Minn.), 48 N. W. Rep. 1129 (1891).

§ 10. Mesne Profits—When Not Allowed.—Where the defendants had not been in the actual possession of the premises in dispute, receiving no profits therefrom, as where the premises are uninclosed and unimproved prairie lands, no damages can be awarded for use and occupation.¹

Where the bad faith of the possessor is technical merely, and the opposition to the real owner's title has been made in good faith, and the property is an unimproved waste from which no revenue was obtained, nor could have been obtained, in its unimproved state, it is improper to charge the possessor with the rents and revenues which he ought to have obtained, based upon what was obtained by other persons from improved property. *City of New Orleans v. Christmas*, 131 U. S. 220; 9 S. Ct. 745; *Same v. United States*, Id. 755 (1889).

Plaintiff in ejectment, having filed his statement, as required by the West Virginia statute, of the rents and damages claimed by him, agreed to waive his claim for certain damages in consideration that defendant would

¹ *Griffey v. Kennard*, 24 Neb. 174; 38 N. W. Rep. 791 (1888).

let judgment go by default, and would pay "all legal costs, and legal rents, in such suit." No further proceedings of any kind were had in such suit, and it was at last stricken from the docket, under the four-years rule. Plaintiff afterward brought his action of covenant on the agreement for the rents. Code W. Va. 1887, C. 90, § 81, provides that, where judgment goes by default in ejectment, damages for mesne profits shall be assessed by the court, unless the parties require a jury. *Held* that, as the "legal rents in such suit" had not been ascertained in the manner prescribed by statute, no action therefor can be maintained on the agreement. Brannon, J., dissenting. *McCann's Adm'r v. Righter*, 34 W. Va. 183; 12 S. E. Rep. 497 (1891).

In an action for mesne profits of vacant, unimproved city lots, the defendant, a *bona fide* purchaser, can not be required to account for more than such rental value as he might fairly have obtained during the time of the ouster by a lease of premises from year to year in their unimproved condition. *Worthington v. Hiss*, 70 Md. 172; 19 Md. L. J. 919; 16 Atl. Rep. (1889) 534.

§ 11. **Mesne Profits and Use and Occupation.**—The action of trespass for mesne profits differs from the action for use and occupation; the latter is founded upon a promise, express or implied, while the former springs from a trespass, an entry *vi et armis* upon premises, and a tortious holding. The action to recover mesne profits is an action *quare clausum fregit*, and can not be maintained without proof of the trespass. It is founded on the action of ejectment, generally, and follows a recovery in that action.¹ This distinction is, however, abolished in many States, and the matter of the damages proper to be recovered in actions for mesne profits is regulated by statute. In New York the Revised Statutes have prescribed as the measure of damages in this class of cases the same rule which prevails in assumpsit for use and occupation. The compensation in such cases is to be adjusted as upon a contract, and not upon the footing of a tort.²

In the action for use and occupation the burden of proof is upon the plaintiff to show that the relation of landlord and tenant by reason of some contract, expressed or implied, existed between the parties. *Lackwood v. Thunder Bay*, 42 Mich. 536; *Moses v. Arnold*, 43 Iowa, 187; *Noyes v. Loving*, 55 Me. 408; *Cent. Mills Co. v. Hart*, 124 Mass. 123; *Moore v. Harvey*, 50 Vt. 297; *Gallagher v. Hernilberger*, 57 Ind. 63; *Pierce v. Pierce*, 25 Barb. (N. Y.) 243; *McNair v. Swartz*, 16 Ill. 24; *Scales v. Anderson*, 26 Miss. 94.

An implied promise to pay rent can not arise out of a trespass or tortious entry upon land, and an adverse holding in the defendant's own right. *Goddard v. Hall*, 55 Me. 579; *Irvine v. Hamline*, 10 Serg. & R. (Pa.) 220.

¹ *Thompson v. Bower*, 60 Barb. ² *Holmes v. Davis*, 19 N. Y. 488. (N. Y.) 463.

When a contract does not exist *assumpsit* will not lie for use and occupation; after a recovery in ejectment, trespass for mesne profits is the proper remedy. *Dean v. Tucker*, 58 Miss. 487; *Scales v. Anderson*, 26 Miss. 94; *Larrabee v. Lumbert*, 36 Me. 440; *Leland v. Tousey*, 6 Hill (N. Y.), 328; *Morgan v. Varick*, 8 Wend. (N. Y.) 587; *Poindexter v. Cherry*, 4 Yerg. (Tenn.) 305.

The action for an account rendered will not lie for mesne profits. *Harker v. Whitaker*, 5 Watts (Pa.), 474.

Where the relationship of tenants in common exists, and one tenant has evicted the other, the disseizee can not maintain *assumpsit* against the disseizor for rents and profits accruing during the period of the disseizin. Possession under an adverse title negatives the theory of a promise to pay rent, and the tort can not be waived for the purpose of trying title to land in an action of *assumpsit*. *Richardson v. Richardson*, 72 Me. 403; *Van Alstine v. McCarty*, 51 Barb. (N. Y.) 326; *Bockes v. Lansing*, 74 N. Y. 437; *Sampson v. Shaeffer*, 3 Calif. 196.

§ 12. The Action for Mesne Profits at Common Law.—Under the common law no provisions existed by which a jury are authorized to inquire into the actual damages sustained by the plaintiff for the wrongful withholding of the possession of his lands; but a remedy was provided which was far more comprehensive in its nature than any which could be obtained by an adaptation to this object of the action of ejectment itself. This remedy was termed an action for mesne profits, and the rules and practice applicable to it were in many respects peculiar and exclusive.¹

§ 13. The Law Stated in Adams on Ejectment.—On the first introduction of the action of ejectment, and while the ancient practice prevailed, the measure of the damages was the profits of the land accruing during the tortious holding of the defendant; but when the proceedings became fictitious, and the plaintiff nominal, the damages assessed became nominal also, and no provisions have since been made by the courts, either by engrafting additional conditions upon the consent rule or by the invention of new fictions, to enable the jury in the action of ejectment to inquire into the actual damages, and include in their verdict the real injury sustained by the wrongful holding. The party has not, however, been left without redress; and the remedy provided is far more compre-

¹ *Webster v. Stewart*, 6 Iowa, 403; *Boyd v. Cowan*, 4 Dall. (U. S.) 138; *Benson v. Matsdorf*, 2 Johns. (N. Y.) *Burton v. Austin*, 4 Vt. 105; *Battin v. 369*; *Murphy v. Guion*, 2 Hayw. (N. C.) *Bigelow, Pet.* (U. S.) C. C. 452. 145; *Den v. Chubb, Coxe* (N. J.), 466;

hensive and efficacious in its nature than could have been obtained by any adaptation to this object of the action of ejectment itself. The courts have sanctioned an application of the common action of trespass *vi et armis* to the purposes of this remedy. It is generally termed an action for mesne profits, and the plaintiff complains in it of his ejection and loss of possession, states the time during which the defendant (the real party) held the land, or took the rents and profits, and prays judgment for the damages which he has thereby sustained.¹

§ 14. **The Common Law Action Abolished in Some States and Modified in Others.**—Statutory enactments in many of the American States have materially modified the common law of the remedy for mesne profits. In others the action has been abolished by provisions creating statutory remedies.²

In New York, the remedy for mesne profits is by an action prosecuted by summons and complaint. The principles of the provisions of the Revised Statutes in relation to the recovery of mesne profits remain in force, and are to be applied to an action therefor after judgment in ejectment, though in form like the old action of trespass. *Holmes, Adm., v. Davis*, 19 N. Y. 488; 21 Barb. (N. Y.) 265.

In Illinois, instead of the action for trespass for mesne profits, the plaintiff is required, within one year from the recovery in ejectment, to make and file a suggestion of his claim substantially in the form of a declaration for use and occupation. *R. S. Ill.* 1889, 600.

Suggestion of claim for mesne profits in Illinois.

In the ——— Court. ——— Term, 18—.

A. B. }
vs. } Ejectment. Claim for mesne profits.
C. D. }

And now on this ——— day of, etc., comes the plaintiff, by E. F., his attorney, and, according to the form of the statute in such case made and provided, suggests to the court here, that the defendant, on, etc., in, etc., was indebted to the plaintiff in the sum of ——— dollars, for the use and occupation of the tenements above in the said declaration and judgment mentioned, by the defendant held, used and occupied, at his request, for a long space of time before then elapsed; and being so indebted, the defendant, in consideration thereof, on the day last aforesaid, there promised the plaintiff to pay him the said sum of money, on request. Yet the defendant, though requested, has not paid to the plaintiff the said sum of money, or any part thereof, but refuses so to do; to the damage of the plaintiff of ——— dollars, etc. (*Puterbaugh's Common Law*, 615.)

Suggestions for damages (mesne profits) under the old New York practice.

Title, etc.:

And now at this day, to wit, the ——— day of ——— in the year one thousand eight hundred and thirty-six, at, &c., before the said [or, "within

¹ Adams on Ejectment, 443.

² Wythe v. Myers, 3 Saw. (U. S) 595.

mentioned,"] Justices of the Supreme Court of Judicature aforesaid, [or, "within mentioned,"] comes the said [or, "within named,"] A. B. by his attorney, and, according to the form of the statute in such case made and provided, suggests to the said court, and gives the said court, before the aforesaid Justices thereof, now here, to understand and be informed, that the said A. B. claims from the said, [or, "within named,"] C. D. the sum of ——— dollars; in which sum the said C. D. is indebted to him, the said A. B., for the use and occupation of the premises, in the above, [or, "within,"] written judgment described, from the ——— day of ——— in the year, &c., until the ——— day of ——— in the year, &c., during all which time the said C. D. enjoyed the mesne profits thereof; and the value of which profits amounts to the said sum of ——— dollars, above claimed. And being so indebted as aforesaid, the said C. D. in consideration thereof afterward, to wit, on, &c., [same day after the recovery of the judgment,] at, &c., undertook, and then and there faithfully promised the said A. B. to pay him, the said A. B., the said sum of ——— dollars, when he, the said C. D., should be thereunto afterward requested: Yet the said C. D. although often requested, &c., hath not yet paid the said sum of ——— dollars, or any part thereof, to the said A. B., but so to do hath hitherto wholly refused, and still doth refuse, to the damage of the said A. B. of the said sum of ——— dollars, above claimed, &c. (Yates' Pleading, 492.)

The statute of New York, abolishing the action of mesne profits, and substituting a suggestion upon the record, applies only to mesne profits strictly, the right to which results from the recovery in ejectment. The original entry is still the subject of an action for trespass; and so are mesne profits where the plaintiff obtains possession without suit, or without prosecuting suit to judgment; nor does the judgment apply where the claim for mesne profits is not solely against the person who was defendant in ejectment, but is against him and others jointly; in such case trespass for mesne profits may be maintained, even though it appear that the plaintiff before the ouster complained of had entered into an executory contract for the sale of the premises, and that his vendee was in possession at the time of the ouster. *Leland v. Tousey*, 6 Hill (N. Y.) 328. But see *Cummings v. M'Gehee*, 9 Porter (Ala.) 349.

§ 15. The Action for Mesne Profits Exclusive in its Nature.—The action for mesne profits appears to be quite exclusive in its nature. Persons who are in the wrongful possession of lands and tenements, whether the original entry was in good faith or in bad faith, must, after their eviction, respond in this form of action for the rents and profits received and the damages sustained by the owner. Mesne profits can not be recovered in forms of action founded upon contracts expressed or implied.¹

¹ *Sylvester v. Ralston*, 31 Barb. (N. Y.) 55; *dard v. Hall*, 55 Me. 579; *Butler v. Y.* 286; *McNair v. Swartze*, 16 Ill. 24; *Cowles*, 4 Ohio, 205; *Larrabee v. Lum-Bard v. Nevin*, 9 Watts (Pa.), 328; *bert*, 34 Me. 79; *Leland v. Tousey*, *Watson v. Brainard*, 33 Vt. 88; *God-* 6 Hill (N. Y.), 328; *Poindexter v.*

The action for mesne profits can not be maintained until there is a recovery of the land by the plaintiff in an action of ejectment. *Burton v. Austin*, 4 Vt. 105; *Smith v. Benson*, 9 Vt. 138.

An action of trespass is a proper mode of recovering mesne profits after a recovery in ejectment, under the acts of 21st March, 1806, and 13th April, 1807 (Pennsylvania). *Osbourn v. Osbourn*, 11 Serg. & R. (Pa.) 55.

§ 16. **Parties Plaintiff.**—Under the modern practice, the fictions of the common law being abolished, the plaintiff in actions for the recovery of mesne profits must be the real party in interest. He is in general the party who was the plaintiff in the ejectment suit, but the right of action may be assigned,¹ in which case the assignee becomes the real party in interest.

A person is entitled to mesne profits which accrued during his minority. *McGrub v. Bray*, 36 Wis. 333.

A municipal corporation may maintain an action for mesne profits for the use of a street. *City of Apalachicola v. Apalachicola, etc., Co.*, 9 Fla. 340.

A *cestui que trust* who has recovered his lands may also have his action for the rents. *Pugh v. Bell*, 1 J. J. Marsh. (Ky.) 399.

Under Code Colo., § 3, requiring actions to be brought in the name of the real party in interest, an action may be maintained by a purchaser against trespassers for mesne profits accruing after his purchase, and before delivery of seizin, and pending ejectment by his grantor. *Limberg v. Higenbotham*, 11 Colo. 156; 17 Pac. Rep. 481 (1888).

A mortgagee who recovers the mortgaged premises in ejectment may maintain his action for mesne profits against the assignee of the mortgagor from the time he had notice to quit, and at any rate from the time of the service of the writ of ejectment. *Lyman v. Morse*, 6 Vt. 345; but see *Sanderson v. Price*, 1 N. J. 636; *Keech v. Hall*, 1 Doug. (Mich.) 21.

Where mortgagee brings writ of entry against mortgagor without declaring upon the mortgage, and recovers a judgment at common law by which he enters upon the mortgagor, the mortgagor is not liable in trespass for mesne profits. So where the grantee of an equity of redemption conveyed the same to a stranger, but still remained in possession, and mortgagee brought a writ of entry against him, not declaring on the mortgage, and recovered judgment at common law, and entered on the tenant by virtue thereof, but showing no title except under the mortgage, it was held, that tenant was not liable to mortgagee for mesne profits. *Boston Bank v. Reed*, 8 Pick. (Mass.) 459.

In Massachusetts a mortgagee can not recover mesne profits of a mortgagor, after a judgment for possession, for the time anterior to the recovery of his judgment. *Wilder v. Houghton*, 1 Pick. (Mass.) 87; *Mayo v. Fletcher*, 14 Pick. (Mass.) 525.

The plaintiffs, grandchildren of the life-tenant, acquired by purchase the life-tenant's interest in said land, and brought ejectment against the defend-

Cherry, 4 Yerg. (Tenn.) 305; *Dean v. Van Alstine v. McCarty*, 51 Barb. (N. Tucker, 58 Miss. 487; *Harker v. Y.*) 437.

Whittaker, 5 Watts (Pa.), 474; *Richardson v. Richardson*, 72 Me. 403; ¹*Lord v. Dearing*, 24 Minn. 110.

ant, who held adverse possession thereof. Plaintiffs' grandmother died pending the litigation, whereby plaintiffs' title was terminated. Held, that the action might nevertheless be continued for the recovery of mesne profits and damages. *Hairston v. Dobbs*, 80 Ala. 589; 2 So. Rep. 147 (1887).

Where the right of the plaintiff in ejectment to recover possession has terminated, and his right of recovery has therefore been limited to a claim for mesne profits and damages, and the defendant sets up in defense, first, that he had had adverse possession and made permanent improvements, and second, that he had held possession under color of title and in good faith, these defenses were incompatible, and that the defendant must be put to his election which he would rely on. *Hairston v. Dobbs*, 80 Ala. 589; 2 So. Rep. 147 (1887).

One who has purchased an estate for the life of another in land is not entitled to payment from the remainder-men for permanent improvements made by him on the land in a suit for the land by the remainder-men, where they do not claim mesne profits, though he may have thought that he got a fee-simple title when he purchased. *Taylor v. Kemp*, 86 Ga. 181, 12 S. E. Rep. 296.

A land owner sued the parties in possession for mesne profits. The defendants notified their grantor, who had warranted the title, and he conducted their defense. After recovering judgment, the plaintiff sued the grantor to recover the amount of such judgment. The defendants in the original suit were not made parties, and no objection was raised on that ground. Held, that the fact that some of said defendants had died after entry of judgment against them did not affect the suit against the grantor. *Whitney v. City of New Orleans*, 138 U. S. 595; 43 Fed. Rep. 215 (1891).

The action for the recovery of mesne profits may be brought against the defendant in the original action of ejectment. In case the defendant in the action of ejectment gave up the possession of the premises in suit to a third person, after the commencement of the suit, the action to recover the mesne profits may be brought against such third person, and he is liable for the same, provided always, of course, that the plaintiff recovers the premises in the ejectment suit. *Jackson v. Stone*, 13 Johns. (N. Y.) 447.

§ 17. **Under the Old Practice.**—The lessor of the plaintiff in the antecedent action of ejectment, is, of course, the person concerned in interest, but he may bring his action for mesne profits either in his own name, or that of his nominal lessee. The former, however, is the most advantageous method, as he may then, upon proper proofs, recover damages for the rents and profits received by the defendant, anterior to the time of the demise in the ejectment, which can not be done in an action at the suit of the nominal plaintiff; and the courts will not stay the proceedings until security be given for the costs, which will be done when the action for mesne profits is brought in the name of such nominal lessee.¹

¹ Adams on Ejectment, 447; Buller observed, that when the ancient practice is resorted to and the plaintiff

§ 18. **Parties Defendant.**—The proper parties to be made defendants in the action to recover mesne profits are the persons who have wrongfully withheld the possession of the premises and appropriated the profits. And this rule embraces all persons coming into possession under the defendants during the pendency of the proceedings for the recovery of the land.¹

A land owner sued the parties in possession for mesne profits. The defendants notified their grantor, who had warranted the title, and he conducted their defense. After recovering judgment, the plaintiff sued the grantor to recover the amount of such judgment. The defendants in the original suit were not made parties, and no objection was raised on that ground. *Held*, that the fact that some of said defendants had died after entry of judgment against them did not affect the new suit against the grantor. *Whitney v. City of New Orleans*, 138 U. S. 595; 43 Fed. Rep. 215 (1891).

Where a defendant was added in ejectment, he having taken possession of the premises after the action was commenced, it was held that the only necessity for making him a defendant was to hold him for mesne profits, as he would then be concluded by the judgment. *Willingham v. Long*, 47 Ga. 540.

After judgment for the plaintiff in ejectment, trespass for the mesne profits, without proof of an actual trespass, does not lie against a person who was no party to the suit when the judgment was entered. *Alexander v. Herbert*, 2 Call (Va.), 508.

Where the heirs of a defendant in an action of ejectment are substituted upon his death, their liability for mesne profits is limited to the rents and profits accruing during the time the heirs are in possession. *Cavender v. Smith*, 8 Iowa, 360.

In Maryland, where a third person entered in the possession of the premises during the pendency of the ejectment, the defendant is still answerable for mesne profits; and the action for mesne profits may accordingly be brought against him. If he can prove, however, that the plaintiff received the profits, he is not then answerable for the profits so received. *West v. Hughes*, 1 Har. & J. (Md.), 574.

The action will lie against infants although they have never been in possession except by their guardian. *Molton v. Mumford*, 3 Hawks (N. C.), 483.

The action will lie against a corporation. *McCready v. Guardians, etc.*, 9 S. & R. (Pa.) 94.

Where a party voluntarily, and with plaintiff's consent, was joined as defendant in ejectment for the purpose of testing his own title, and trying the right of possession of the land, it was held that the fact that he was

in the ejectment is a real person, the (N. C.) 128; *Merritt v. O'Neil*, 13 Johns. court will not permit him to release (N. Y.) 447; *Jackson v. Hills*, 8 Cowen the action for mesne profits, should (N. Y.) 294; *Jeffries v. Zane*, 1 Miles the lessee bring it in his name. *Close's* (Penn.) 287; see *Chirac v. Reinicker*, Case, Skin. 247; *Anon. Salk.* 260. 1 *Wheat.* (U. S.) 296.

¹ *Bradley v. McDaniel*, 3 Jones L,

thus united with the defendants, as against the title of the plaintiff, did not render him jointly liable with the other defendants for mesne profits, when he was powerless to prevent the trespasses of the other defendants, and did not aid, abet or encourage their commission. *Eastwick v. Saylor*, 85 Pa. St. 15.

§ 19. **Personal Representatives.**—The liability of personal representatives to respond in damages for mesne profits as well as the right to recover the same, are in many States matters of statutory regulation. As a general rule it may be stated that where a person entitled to mesne profits dies, his personal representatives are entitled to the same accruing to the time of his death, and that accruing subsequently follows the title of the land. Originally, the right of action for mesne profits, being in the nature of an action of trespass, died with the party liable; but this rule has been changed in some States and the right may now be asserted against the personal representatives, heirs or devisees.¹

In Tennessee, it is held that an executor can not maintain the action for mesne profits, although he is authorized by the will to sell the lands of the testator and divide the proceeds. The rents and profits being incident to the ownership of the land, could only be asserted by the person having the title. *Brown v. McCloud*, 3 Head (Tenn.), 280.

A compromise between plaintiffs and the heirs of a decedent, by which plaintiffs acquired title to land of which they had been in possession, and by which they were released from all liability for rent during the time they were in possession, does not relieve the administrator from accounting to plaintiffs for rents accruing after they obtained title. *Garlington v. Copeland* (S. C.), 10 S. E. Rep. 616 (1890).

In North Carolina, it is held that the executors were entitled to that portion of the mesne profits accruing up to the time of the owner's death, and the devisees to that accruing subsequently. *King v. Little*, 77 N. C. 135.

In New York, the mesne profits to the time of the death of the testator, go to the executor as part of the personal estate. *Hotchkiss v. Auburn*, etc., R. R. Co., 36 Barb. (N. Y.) 600.

§ 20. **Liability of Executors and Administrators—The Rule Stated By Adams.**—As the action for mesne profits is an action of trespass, it can not be maintained against executors and administrators, for the profits accruing during the lifetime of the testator or intestate; nor will a court of equity interfere to enforce the payment of them against personal representatives, when the lessor has been deprived of his legal remedy by

¹ See *Brown v. McCloud*, 3 Head 518; *Cobb v. Biddle*, 14 Pa. St. 444; (Tenn.), 280; *Hotchkiss v. Auburn*, *King v. Little*, 77 N. C. 138; *Blight v. etc.*, R. R. Co., 36 Barb. (N. Y.) 600; *Ewing*, 26 Pa. St. 135. *Rhodes v. Crutchfield*, 7 Lea (Tenn.),

mere accident of the defendant's death. But where the lessor was delayed from recovering an ejectment by a rule of the court of law, and by an injunction at the instance of the defendant, who ultimately failed both at law and in equity, the court decreed an account of the mesne profits against his (the defendant's) executors.¹

The action for mesne profits can not be maintained against executors or administrators for the profits accruing during the lifetime of the testator or intestate; nor will a court of equity interfere to enforce the payment of them against personal representatives when the lessor has been deprived of his legal remedy by the mere accident of the defendant's death. But where the lessor was delayed from recovering an ejectment by a rule of the court of law, and by an injunction at the instance of the defendant, who ultimately failed both at law and in equity, the court decreed an account of the mesne profits against his (the defendant's) executors. *Pultney v. Warren*, 6 Ves. Jr. 73.

§ 21. **Joinder of the Cause of Action.**—The general rule under the modern practice in the American States allows a party bringing an action of ejectment to unite in the same action a claim for mesne profits, and if he recovers the possession of the lands in controversy he may have his mesne profits, or, as they called in some jurisdictions, his damages, assessed in the same suit.²

In speaking of joining in one suit a claim for possession and a claim for mesne profits, Chief Justice McKean said, of the difficulty the jury may labor under in deciding on the titles of the parties to possession, and at the same time in fixing the value of the mesne profits if the verdict shall be for the plaintiff, "There can be no great hardship in this. In actions of waste, dowry, assize, and all others, where the thing itself, as well as the damages, is recovered, the jury are liable to the same inconvenience; nor can I perceive any great perplexity that can arise in determining the rent, or annual value, of a house or parcel of land, when complete evidence is given of it. It appears to me that the inconvenience or the hardship is the other way. After a person has been unlawfully kept out of his house or land for a series of years, and undergone great trouble and expense in recovering a judgment for them, to give him the possession merely, without any satisfaction for the use and occupation during the action, does not seem complete justice." *Boyd's Lessee v. Cowan*, 4 Dall. (U. S.) 138.

¹ *Adams on Ejectment*, 449; *Pultney v. Warren*, 6 Ves. J. 73. *Dawson v. McGill*, 4 Whart. (Pa.) 230; *Harrall v. Gray*, 12 Neb. 543; *Carman*

² *Beard v. Federy*, 3 Wall. (U. S.) 478; *Hecht v. Colquhoun*, 57 Md. 563; *Vandevoort v. Gould*, 3 Trans. App. (N. Y.) 57; *Garner v. Jones*, 34 Miss. 505; *Armstrong v. Hinds*, 8 Minn. 254; *Lord v. Deering*, 24 Minn. 110; *Field v. Columbet*, 4 Saw. (U. S.) 523; *Beard v. Beam*, 88 Pa. St. 319; *Bottroff v. Wise*, 53 Ind. 33; *Patterson v. Ely*, 19 Calif. 28; *Walker v. Mitchell*, 18 B. Mon. (Ky.) 541; *Livingston v. Tanner*, 12 Barb. (N. Y.) 481; *Hotchkiss v. Auburn, etc., R. R. Co.*, 36 Barb. (N. Y.) 600.

In many States under statutes requiring of the jury special finding, a practice has grown up in recent times of submitting to a jury many questions far more intricate and perplexing than assessing the damages in an action for ejectment after they find for the plaintiff. *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132 (1889).

A claim for damages for withholding one parcel of land can not, however, be united with a claim to recover possession of another piece of land with damages for withholding it. *Holmes v. Williams*, 16 Minn. 164.

§ 22. **The Judgment in Ejectment.**—The right to mesne profits is a necessary consequence of a recovery in ejectment. The defendant is concluded by the judgment, and can not afterward, in an action for the mesne profits, be permitted to show a better title in bar, or a subsequent recovery by him of the same premises in another action.¹

A judgment in an action to recover land, reciting that "the plaintiffs in open court, before the trial and judgment, withdrew all claim against the defendants for use and occupation of said premises," shows that the right to damages for use and occupation was not adjudicated in that action. *Wells v. Newsom*, 76 Iowa, 81; 40 N. W. Rep. 105 (1888).

An action for mesne profits will not lie until after a recovery in ejectment; nor will it lie for an injury to the freehold until after such recovery. *Morgan v. Varick*, 8 Wend. (N. Y.) 587; *Burton v. Austin*, 4 Vt. 105.

Damages can never be recovered unless the land or some portion of it is recovered. *Smith v. Benson*, 9 Vt. 138.

In an action of trespass to recover mesne profits, after a recovery of the land by ejectment, if the plaintiff give evidence of profits received by the defendant anterior to the time of the issuing of the writ of ejectment, then the verdict and judgment in that action are not conclusive, and the defendant may give evidence to show that the title was then in him.

In such action the plaintiff may recover more than the rent or yearly value of the land; he may charge all actual damage and injury to the premises. *Huston v. Wickersham*, 2 Watts & S. (Penn.) 308.

In an action for mesne profits the record of the plaintiff's recovery in ejectment is not conclusive evidence of his title as against strangers to the record, but only as against parties and privies. *Leland v. Tousey*, 6 Hill (N. Y.), 328.

Where the title of the lessor, being a life estate, ends before the trial of the cause, the plaintiff, though he can not turn the defendant out of possession, is entitled to judgment, so as to enable him to recover the mesne profits, but with a perpetual stay of the writ of possession. *Jackson v. Davenport*, 18 Johns. (N. Y.) 295.

In trespass for mesne profits, consequent on an ejectment, and judgment by default against the casual ejector, the defendant can set up no matter of defense admissible in the original action—*e. g.*, that he was not in possession of the premises in question. *Jackson v. Combs*, 7 Cow. (N. Y.) 363;

¹ *Emerson v. Thompson*, 19 Mass. Ejectment, H.; *Compere v. Hicks*, 7 487; *Adams on Ejectment*, 335; *Ashir T. R.* 723; *Benson v. Matsdorf*, 2 v. *Parkin*, 2 Burr. 667; *Bac. Abr.*, Johns. (N. Y.) 369.

Baron v. Abeel, 3 Johns. (N. Y.) 481; Langendyck v. Burhans, 11 Johns. (N. Y.) 463.

The confession of entry by the defendant in the ejectment is sufficient to enable the plaintiff to recover; *aliter*, when the judgment in ejectment was recovered by default. Brown v. Galloway, 1 Pet. (C. C. U. S.) 291.

After recovery in ejectment the plaintiff can not give evidence of the annual value of the premises beyond the time of the lease, mentioned in the declaration in ejectment. Shotwell v. Boehem, 1 Dall. (U. S.) 172.

After a recovery in ejectment by default, against the casual ejector, the lessor of the plaintiff may maintain trespass for the mesne profits against the tenant, as well for the use of the land as for the costs of the ejectment. Baron v. Abeel, 3 Johns. (N. Y.) 481.

§ 23. The Right of Action Accrues When the Plaintiff Acquires Possession.—A party entitled to mesne profits for lands wrongfully withheld from him must obtain the possession of the lands before he is in a position to maintain the action for mesne profits.¹

Where it appeared from the evidence that the possession was not in the plaintiffs it was held, "The claim in the complaint to recover rents and profits can not be sustained, for it appears that the plaintiffs are out of possession. They must recover possession before they are in a position to claim rents and profits." Bockes v. Lansing, 74 N. Y. 437.

Where the defendant wrongfully removed and converted a saw-mill, which constituted the subject-matter of dispute, leaving nothing of which possession could be taken, it was held that as the removal took place, and the lease expired, before the trial, so that a writ of possession could not be executed, the plaintiff should have urged his right, in the ejectment suit, to have actual instead of nominal damages, as in ordinary cases. Stancil v. Calvert, 63 N. C. 616; see also on the same point, Carman v. Beam, 88 Pa. St. 319; Brown v. Galloway, Pet. (C. C. U. S.) 291; Dodge v. Page, 49 Vt. 137; Woodhull v. Rosenthal, 61 N. Y. 385.

The objection that the plaintiff's proofs fail to show that the defendant withheld the possession must be made in the court below. It is not available on appeal in the first instance. Hynes v. McDermott, 83 N. Y. 41.

§ 24. Not Material How Possession is Obtained.—It is wholly immaterial how the plaintiff obtains possession of the premises. If his possession is lawfully obtained he is in a position to maintain his action for mesne profits. A writ of possession is not necessary, for the plaintiff may take peaceable possession without the writ or he may be let into possession by the defendant.²

¹ Reid v. Stanley, 6 W. & S. (Pa.) (N. C.) Law, 301; Carson v. Smith, 369; Zimmerman v. Eshbach, 15 Pa. 1 Jones (N. C.) Law, 106; Miller v. St. 417; Nelson v. Allen, 1 Yerg. Melchor, 13 Ired. (N. C.) Law, 439. (Tenn.) 360; Stancill v. Calvert, 63 N. ² Stearns on Real Action; 410 Cal- (C. 616; Murphy v. Guion, 2 Murph. vort v. Harsfall, 4 Esp. 167. N. C.) 238; Poston v. Henry, 11 Ired.

§ 25. **The Plaintiff's Possession—Origin of the Rule.**—The rule of law which requires the plaintiff in the action for mesne profits to show himself in possession of the premises for the use and occupation of which he is claiming, grows out of the doctrine that the use and occupation were wrongful and in the nature of a trespass. Under the English law, the action of trespass being a possessory action, founded upon an injury to the possession, proof of actual possession in the plaintiff was necessary to support the action.¹ But the tendency in the American States is to trust the right to mesne profits more in the nature of an action for use and occupation than of trespass to real property, although possession in the plaintiff still seems to be an essential element of the plaintiff's case in most if not all of the States.²

The action is founded on a privity of contract and not upon a privity of estate and therefore it does not lie where the possession is tortious. *Codman v. Jenkins*, 14 Mass. 95.

Where one party occupies the premises of another in the absence of an express agreement, and such occupation is beneficial to the party so occupying the same, the law raises an implied agreement to pay a reasonable rent for the premises so occupied. *Baley v. Barutio*, 120 Ill. 192 (1887).

§ 26. **What Occupancy of the Premises is Sufficient—The Rule Stated in Adams.**—An actual occupation of the premises by the defendant, during the period for which the damages are claimed, is unnecessary; it is sufficient if he was interested in and derived benefit from the premises during that period; as, for example, where it was proved that the defendant, holding at that time lawfully, had underlet to H., and that the defendant and H.'s interest became determined, and the right of possession vested in the plaintiff, and that H. notwithstanding held on, and continued to pay rent to the defendant, who also declared H. to be his tenant when the plaintiff demanded of him possession. But at the same time proof of actual occupation is always sufficient to charge the defendant; for any person found in possession after a recovery in ejectment is liable to this action; and it is no defense to say that he was upon the premises as the agent and under the license of

¹ 2 Phillips on Evidence, 317.

² The action of use and occupation lies where a contract has been made either by express or implied agreement for the use of real property and no amount of rent fixed: *Abel v. Radcliff*, 13 Johns. (N. Y.) 297 (1816); *Osgood v. Deway*, 13 Johns. (N. Y.) 240 (1816); *Fitchburg & Co. v. Melvin*, 15 Mass. 270.

the defendant in ejectment, for no man can license another to do an illegal act. The measure of the damages, however, in cases of this description, will not be the whole mesne profits of the lands, but will depend upon the time the defendant has had them in his occupation, and all the other peculiar circumstances of the case.¹

§ 27. Nominal Damages in Ejectment Not a Bar to the Recovery of Mesne Profits.—The recovery of nominal damages, in the action of ejectment, is not a bar to an action for the actual damages and mesne profits. These damages are considered necessary in some jurisdictions to entitle the plaintiff to costs in the ejectment suit. They are not given in satisfaction of the actual damages and mesne profits which constitute an independent cause of action.²

§ 28. A Conveyance in Fee Not a Release of the Right to Recover Mesne Profits.—After a recovery in ejectment, a conveyance in fee simple of the premises in question by the plaintiff in ejectment to a third person is not a release of the right to recover and the action for mesne profits may be still maintained.³

§ 29. The Claim for Mesne Profits Assignable.—The right to recover damages and mesne profits is assignable. A recovery may be had for mesne profits taken prior to the acquisition of the plaintiff's title, provided the right of action is transferred to the plaintiff by his grantor,⁴ and an assignee or other party coming into the possession of the lands in dispute during the pendency of the controversy is liable for mesne profits.⁵

Plaintiff had had transferred to her the right to sue said grantor for the price paid him for the land. *Held*, that this fact did not affect her right to recover for mesne profits. *Whitney v. City of New Orleans*, 138 U. S. 595; 43 Fed. Rep. 215 (1891).

§ 30. Mesne Profits—Co-tenants and Tenants in Common.

¹ Adams on Ejectment, 449; Doe v. Harlow, 12 Ad. & Ell. 40; Burne v. Richardson, 4 Taunt. 720. ³Duffield v. Stille, 2 Dall. (U. S.) 156 (1792).

² Simberg v. Higenbotham, 11 Colo.

⁴ Lord v. Dearing, 24 Minn. 110.

⁵Jackson v. Stone, 13 Johns. 156; 17 Pac. Rep. 481 (1888); Murney (N. Y.) 447; Fogarty v. Sparks, 22 v. Snow, 1 Yates (Pa.), 156; Davis v. Delpit, 25 Miss. 445; Van Alen v. Rogers, 1 Johns. Cases (N. Y.), 281; Sedgwick on Damages, 129.

We have seen that the action of ejectment lies between co-tenants and tenants in common; so the action for mesne profits may be sustained by one co-tenant against his companion as a necessary consequence of the recovery in ejectment.¹ But the recovery seems to be limited to the period during which the occupancy of the premises in question by his co-tenant was adverse.²

Tenants in common, recovering land in ejectment against a tenant in common, may bring a joint action for mesne profits. *Camp v. Homesley*, 11 Ired. (N. C.) 211.

Under the old practice, in an action of ejectment by one tenant in common, who had not been ousted, against his co-tenant, the latter might enter into the consent rule, when he did not dispute the title, as to part of the premises only, and the plaintiff might take judgment as to the residue by default, and recover the mesne profits thereof from his co-tenant. *Langendyck v. Burhans*, 11 Johns. (N. Y.) 461.

§ 31. When the Possession Becomes Adverse.—This subject is discussed under the general head of adverse possession. It is sufficient to say here that in order to render the possession of one co-tenant adverse as to another there must have been an ouster, either adverse or constructive, sufficient to support the action of ejectment, and the burden of showing such an ouster in actions for the recovery of mesne profits is upon the plaintiff.³

§ 32. Possession Must be Taken in a Reasonable Time.—In some States the law requires a successful co-tenant in ejectment to take possession of the property within a reasonable time after its recovery in ejectment or his right to recover mesne profits will be lost. What is a reasonable time depends much upon the circumstances of each particular case. In Pennsylvania one month was considered a reasonable time, and the plaintiff was allowed to recover.⁴

§ 33. An Agreement or Ouster an Essential Prerequisite to a Recovery.—In the absence of an agreement to account and where there has been no ouster or exclusion from the enjoyment of the common property it seems that a co-tenant can not

¹ *Langendyck v. Burhans*, 11 Johns. (N. Y.) 461; *Early v. Friend*, 39 Pa. St. 427; *Goodtitle v. Tombs*, 3 Wils. 121; *Hare v. Fury*, 3 16 Gratt. (Va.) 21; *Bryan v. Averett*, 35 Yeates (Penn.), 13.

² *Carpenter v. Mendenhall*, 28 Calif. 484; *Millen v. Myers*, 46 Calif. 535.

³ *Carpenter v. Mendenhall*, 28 Calif. 484.

⁴ *Hare v. Fury*, 3 Yeates (Penn.), 13.

recover from the other co-tenants for an appropriation by them to their own use of any of the products of the common property;¹ but the decisions are not quite uniform on the question.²

§ 34. **Waste Committed by the Disseizee.**—Waste and other injuries of a similar nature, committed upon the premises by the defendant, are also proper elements to be considered in the assessment of damages, and if properly alleged in the declaration or complaint, may be recovered in the action for mesne profits.³ The tendency of our courts is to abridge a multiplicity of suits by uniting in the same complaint different causes of action, legal and equitable, where they arise out of the same transaction or transactions connected with the subject-matter of the action.⁴

When part only of a lot is withheld, the damages sustained by the diminution of the rental value of the whole lot on account of such withholding can not be recovered, in ejectment by the owner, unless specifically alleged. *Gas Light Co. v. Rome, W. & O., R. Co.*, 51 Hun, 119; 5 N. Y. Sup. 459 (1889).

§ 35. **Aggravation of Damages.**—In actions where malicious waste and other willful injuries to the premises are elements of the damages claimed, it is competent to give in evidence the

¹ *Dresser v. Dresser*, 40 Barb. (N. Y.) 8 Wend. (N. Y.) 587; *Kuhns v. Bowman*, 91 Pa. St. 504.

Wilcox v. Wilcox, 48 Barb. (N. Y.) 327; *Henderson v. Easton*, 17 Q. B. 701; *Kean v. Connolly*, 25 Minn. 222; *Ragan v. McCoy*, 29 Mo. 356; *Israel v. Israel*, 30 Md. 120.

² *Shiels v. Stark*, 14 Ga. 435; *Hayden v. Merrill*, 44 Vt. 348; *Early v. Friend*, 16 Gratt. (Va.) 47.

³ *Morrison v. Robinson*, 31 Pa. St. 456; *Field v. Columbet*, 4 Saw. (U. S.) 523; *Alsop v. Peck*, 2 Root (Conn.), 224; *Lee v. Bowman*, 55 Mo. 400; *Emrich v. Ireland*, 55 Miss. 390; *Hillman v. Baumbach*, 21 Tex. 203; *Bonner v. Wiggins*, 52 Tex. 125; *Barton Coal Co. v. Cox*, 39 Md. 1; *Whitledge v. Wait*, *Sneed* (Ky.), 335; *Strong v. Garfield*, 10 Vt. 502; *Walker v. Hitchcock*, 19 Vt. 634; *Huston v. Wickersham*, 2 W. & S. (Penn.) 308; *Cooch v. Geery*, 3 Harr. (Del.) 423; *Johnson v. Futch*, 57 Miss. 73; *Cunningham v. Morris*, 19 Ga. 583; *Morgan v. Varick*,

⁴ The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of the same transaction or transactions connected with the same subject of action. This has reference to such causes of action as are consistent with each other, not to those which are contradictory. Therefore the plaintiff can not claim an absolute, unqualified title to land, as owner in fee simple, coupled with a claim for damages for obstructing him in the use of it, to a greater extent than is authorized by defendant's life lease, and especially for obstructing him in the enjoyment of a private right of way over a part of it. *Smith v. Hallock*, 8 How. (N. Y.) 73.

circumstances which accompany and give character to the acts complained of, but it seems from the general rules of pleading such matters, the peculiar matters relied upon in aggravation, must be stated with reasonable certainty in the complaint. The measure of the damages does not depend upon the form of the action altogether, and though the proceeding be in trespass, if no circumstances of aggravation be shown, the relief is restricted to the line of legal compensation.¹

§ 36. **Mitigation of Damages.**—Under the rule of law fixing the measure of damages or mesne profits the amount of the recovery becomes a mere matter of computation or estimation. The amount which the plaintiff is entitled to recover can not be reduced by evidence tending to show that he obtained the land for an inadequate consideration. Evidence of such matters is inadmissible for the purpose of mitigating the damages.²

§ 37. **Injuries to Premises after Judgment in Ejectment.**—The general proposition that trespass *quare clausum fregit* can be sustained only by the person who had the actual possession of the premises when the injury was committed, is a well settled rule of law, but it is equally well settled that in case of a disseizin the person disseized may, after he has regained possession, by a re-entry maintain trespass against the disseizor and his servants for acts committed by them between the disseizin and the re-entry, for as to them the law, after the re-entry, supposes the freehold to have continued in the person disseized,³ and it has been held that the action lies not only against the disseizee, but also against his grantee,⁴ though it does not seem to lie against a stranger who comes in by title under the disseizor.⁵

“If one disseizes me and during the disseizin he cuts down trees or grass or the corn growing upon the land, and afterward I re-enter, I shall have an action of trespass against him *vi et armis* for the trees, grass, corn, etc., for after my regress the law as to the disseizor and his servants supposes the freehold always continued in me.” Lifford’s Case, 11 Coke Rep. 51; and see Moore v. Hussey, Hob. 98; 20 Vin. Abr., Trespass, 465; 3 Blackstone’s Comm. 210; 1 Chitty’s Pleadings, 177; Holcomb v. Rawlins, Cro. Eliz. 540.

¹ Sedgwick on Damages, 659.

⁵ Morgan v. Varick, 8 Wend. (N. Y.) 587 (1832); Case v. De Goes, 3 Cai.

² Love v. Powell, 5 Ala. 58.

³ Dewey v. Osborne, 4 Cow. (N. Y.) (N. Y.) 261; Weckham v. Freeman, 329 (1825); Lifford’s Case, 11 Rep. 51. 12 Johns. (N. Y.) 184; *contra*, see

⁴ Holcomb v. Rawlins, Cro. Eliz. 6 Bac. Abr., Trespass, c. pl. 3, p. 566. 540.

§ 38. **Improvements.** Under the common law, no allowance could be made for improvements put upon the land by a person in the wrongful possession of the same.¹ The rule of the common law has been considerably modified in many of the States. Unsuccessful defendants in actions of ejectment, who have been in possession of the premises in dispute under color of title, are presumed to have been holding in good faith, and may now have an action to recover the value of their permanent improvements, or they may offset their value against mesne profits in others.² Occupants of lands are not confined to improvements made by them, but they may recover for those made by their predecessors, or the persons under whom they claim.³

Under Gen. St. S. C., § 1835, providing that, after judgment for plaintiff in an action to recover land, if defendant has purchased the land supposing the title to be good, he shall be entitled to recover from plaintiff the value of improvements made on the land by him; where a purchaser of land remains in possession for years, during which time no complaint is made as to his title, he is entitled to betterments though he knew that the conveyance to him was a breach of a trust. *Rabb v. Flenniken* (S. C.), 10 S. E. Rep. 943 (1890).

In ejectment to compel defendant to remove the mouth of a sewer from plaintiff's wharf lot, on which there was neither bulk-head nor wharf, evidence is not admissible, on the question of mesne profits, to show the rental value of the lot if it had been bulk-headed, and if there had been a wharf there. *Harris v. City of Philadelphia* (Pa.), 16 Atl. Rep. 740; Am. Dig. 1891, 1184.

Under the Iowa statute the defendant is not required to surrender possession until he is paid for his improvements. *Webster City, etc., Ry. Co. v. Newson*, 70 Iowa, 355 (1886), and substantially the same rule holds good in Louisiana. *Fletcher v. Cavelier*, 10 La. 116 (1836).

Statutes allowing an unsuccessful defendant in ejectment to recover the value of his permanent improvements, made by him in good faith, are constitutional. *Greswold v. Bragg*, 48 Conn. 577 (1880); *Pacquette v. Pickness*, 19 Wis. 219 (1865); *Fee v. Cowdry*, 45 Ark. 413 (1885); *Ross v. Irving*, 14 Ill. 171 (1852); *Fowler v. Halbut*, 4 Bibb (Ky.), 54 (1815); *Whitney v. Richardson*, 31 Vt. 306 (1858); *Childs v. Shower*, 18 Iowa, 261 (1865).

It is held in Arkansas, where the plaintiff recovered by reason of the defendant's failure to show a proper title in himself, the latter can not be allowed a sum for his improvements in excess of the rents. *Marlow v. Adams*, 24 Ark. 109.

¹ *Webster v. Stewart*, 6 Iowa, 403 169 (1871); *Love v. Shortzer*, 31 Calif. (1850). 487 (1867).

² *Jones v. Carter*, 12 Mass. 314 (1815); ³ *Wright v. Stevens*, 3 G. Gr. (Iowa) *Star v. Star*, 1 Saw. (U. S.) 15 (1870); 63 (1851); *Croton v. Wright*, 16 Iowa, *Bracket v. Norcross*, 1 Green (N. J.), 133 (1864); *Parsons v. Moses*, 16 Iowa, 89 (1820); *Blodgett v. Hitt*, 29 Wis. 440 (1864).

In an action for mesne profits it is error to exclude evidence to show the amount of rents received by defendants upon the ground that such rents include the use of improvements erected by defendants. *Limberg v. Higginbotham*, 11 Colo. 156; 17 Pac. Rep. 481 (1888).

Upon the trial of an ejectment suit, defendant offered a witness to prove in a general way that defendant made improvements on the land equal to if not exceeding in value the amount of mesne profits proved by plaintiff. *Held*, that in the absence of specific proof of what the improvements consisted, and the value of each item thereof, it was not error to deny the offer. *McDowell v. Sutlive*, 78 Ga. 142; 2 S. E. Rep. 937 (1887).

In an action to recover land of one who purchased from the grandmother and mother of the plaintiffs, each of whom had a life estate in the property, judgment should not be rendered for back rents for the period prior to the termination of these life estates. *McIlvain v. Porter* (Ky.), 7 S. W. Rep. 309 (1888).

Evidence as to the cost of breaking done on the land fourteen years before the petition for allowance for improvement is not admissible, the only question being as to the worth of such breaking as an improvement. *Weller v. Newson*, 76 Iowa, 81; 40 N. W. Rep. 105 (1888).

Improvements by the life tenant, or those holding under him, prior to his death, can not be charged against the remainder-men, who, at the time the improvements were made, were minors, and in no position to interfere or complain. *Van Bibber v. Williamson*, 37 Fed. Rep. 756 (1889).

In ejectment by the heirs of a deceased woman, defendant relied on an oral contract by deceased to convey the land to him, in consideration of his promise to support her during life, and on his part performance thereof. The alleged contract was entered into shortly after the parties became acquainted, and while deceased was maintaining herself on the land. Defendant thereafter boarded with deceased, took control of the land, made improvements, and about a year afterward the parties were married. The only direct evidence of the making of the contract was indefinite, consisting of casual remarks by deceased, and conversations between her and defendant overheard by witnesses. *Held*, that the marriage between the parties canceled defendant's claim for improvements made before that time; and his improvements thereafter made are referable to that relation, and his usufruct of the land thereunder, rather than to any supposed contract for the conveyance of the land; and hence he is not entitled to be reimbursed for any of his improvements. *Rogers v. Wolfe* (Mo.), 14 S. W. Rep. 805; Am. Dig. 1891, 1405.

Gen. St. Ky., C. 80, Art. 1, § 1, which provides that an occupant of land, "believing himself to be the owner," shall be reimbursed the value of his improvements before the court shall cause possession to be delivered to the real owner, does not authorize an allowance for improvements made by occupants after they had notice of the real owner's claim, though they may have believed that such claim was not well founded. *Leavison v. Harris* (Ky.), 14 S. W. Rep. 343 (1890).

Under Code Iowa, § 1983, providing that "any person has color of title who, during his occupancy, has paid the ordinary county taxes for any one year, and two years thereafter have elapsed without repayment of the same by the owner of the land, and such occupancy is continued up to the time

at which suit is brought, by which recovery of the land is obtained, "the color of title thus created will justify a recovery for permanent improvements, made with the knowledge, express or implied, of the owner of the land. *Finnegan v. Campbell*, 74 Iowa, 158; 37 N. W. Rep. 127 (1888).

The statute of Kentucky in relation to betterment provides that their value shall be paid by the successful party to the occupant, before the court rendering the judgment of eviction shall cause possession to be delivered. Section 2 of the same act provides that the court, at the request of either party, shall direct a jury to inquire of damages, and fix the value of improvements. Plaintiff held under a junior patent, and was evicted. He did not ask for a jury to assess the value of his improvements when the judgment was entered, or at that term. *Held*, that the right of compensation for the value of the improvement is not lost. *Counts v. Kitchen*, 87 Ky. 47; 7 S. W. Rep. 539 (1888).

In an action to recover land, a judgment for the plaintiff will not be reversed on the ground that the court below has not found upon an issue in relation to improvements on the land claimed as a set-off to damages for withholding the property, where the only evidence as to such improvements on the record is that there was a house upon the land, but there is no evidence as to its value, or to show that it was put there as an improvement in good faith, as required by Code Civil Proc. Cal., § 741, providing that the value of such improvements may be allowed as a set-off to damages when made by a defendant in good faith. *Wise v. Burton*, 73 Cal. 176; 14 Pac. Rep. 683 (1887).

§ 39. No Recovery for Improvements Made with Notice of Defective Title.—The party seeking to recover for the value of improvements made by him upon lands from which he has been ejected, must show that he has acted in good faith, although the statutes provide that the value of such improvements made upon the faith of a purchase and occupancy of premises under a valid title, may be recovered by him upon being ejected, but a purchaser of incumbered lands, with notice or knowledge of the fact, is not entitled to recover for the value of his improvements.¹

One deriving title to a life tenant, whose interest is plainly shown by the title papers, is not entitled to compensation from the remainder-man for improvements. *Stewart v. Matheny*, 66 Miss. 21; 5 So. Rep. 387 (1889).

One who buys land, knowing that a title adverse to his grantors is asserted by another, and all the facts in relation thereto, but through a mistake of law, believing his grantor's title good, is not a *bona fide* purchaser, within Code Miss. 1880, § 2512, providing that compensation for improvements shall not be allowed a defendant in ejectment "unless he shall claim the premises under some deed or contract of purchase made or acquired in good faith." *Holmes v. McGee*, 64 Miss. 129; 8 So. Rep. 169 (1890).

¹ *George v. Stearn, etc., Co.*, 20 Fed. v. Ten Eyck, 40 Iowa, 213 (1875); Rep. (U. S.) 487 (1884); *Blanchard v. Wood v. Wood*, 83 N. Y. 575 (1881). *Ware*, 43 Iowa, 530 (1876); *Lunquest*

Defendant in ejectment is not entitled to an allowance for betterments unless it appears that he was a *bona fide* purchaser of the land, or that the betterments were made with claimant's knowledge, and without any objection from him or notice of his claim to the land. *Hall v. Hall*, 30 W. Va. 779; 5 S. E. Rep. 260 (1888).

Improvements made after service of the notice of suit to recover the land can not be considered. *Welles v. Newsom*, 76 Iowa, 81; 40 N. W. Rep. 105 (1888).

Rev. Civil Code La., Art. 3451, provides that "the possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact." Article 503 provides that "he is a *bona fide* possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of." Defendant entered into possession of land conveyed to her by her husband in consideration of money advanced to him to satisfy a vendor's lien on the land, and at once made valuable and expensive improvements. Defendant testified that when she accepted the title to the land she thought it was perfect, and prior to the conveyance had never heard it questioned. Subsequently, however, defendant allowed the land to be sold for taxes, and took a conveyance from the purchaser at the tax sale, apparently in order to perfect her title. *Held*, on suit being brought by the children of the husband by a former wife, who claimed an interest in the land as heirs of their mother, that the possession of defendant under the conveyance from the husband must be held in good faith, and that she was entitled to be reimbursed for her improvements, but that she was liable for rent from the date of the tax proceedings. *Montgomery v. Whitfield*, 41 La. Ann. 649; 6 So. Rep. 224 (1889).

Comp. St. Neb., c. 63, § 1, provides that any person claiming title to real estate, whether in actual possession or not, "derived from the records of some public office, or from the United States, or from this State, or derived from any such person by devise," etc., shall not be evicted until he has been paid the value of all lasting and valuable improvements, and also for all taxes, etc. Section 2 provides that parties who have entered lands under the pre-emption and homestead laws shall have such right. Section 11 provides that this act shall be limited to those cases where the title to the real estate in controversy is derived from some other source than that which comes from "such tax titles, tax certificates, or the payment of taxes by any person claiming any interest * * * by reason of such tax deeds or tax titles," etc. No tax deeds or tax titles are referred to in the provisions of the chapter preceding Section 11. *Held*, that the statute intended to afford a remedy to a person claiming under a tax deed. *Page v. Davis*, 26 Neb. 670; 42 N. W. Rep. 875 (1889).

§ 40. **Recoupment for Improvements, etc.**—If improvements of a permanent and beneficial nature have been made upon the land, and the defendant's entry thereon was made in good faith, the value of such improvements should be deducted from the damages. In cases where the plaintiff has neglected to assert his title for a considerable length of time it is certainly equitable to allow the defendant the value of such

improvements made by him in good faith, at least to the extent of the rents and profits claimed.¹ But, in determining the value of such improvements, the measure is the real benefit to the owner by reason of their having been made. Improvements which exceed the actual enhanced value of the premises, or which do not enhance its value, are not to be allowed.²

The law stated by Greenleaf.

The defendant, in his action for mesne profits, if he has in good faith made lasting improvements on the land, may be allowed the value of them, against the rents and profits claimed by the plaintiff. But he can not set up any matter in defense, which would have been a bar to the action of ejectment. 2 Greenleaf on Evidence, § 337; Cawdor v. Lewis, 1 Y. & C. 427; Baron v. Abeel, 3 Johns. (N. Y.) 481; Jackson v. Randall, 11 Johns. (N. Y.) 405; Benson v. Matsdorf, 2 Johns. (N. Y.) 369; Goodtitle v. North, 2 Doug. 584; Utterson v. Vernon, 3 T. R. 539.

Occupants of land who have built a boundary wall out of the true course, thereby damaging the property, are not entitled to compensation, as against the real owner, on the equitable ground that their labor and material have enhanced the value of the land. Leavison v. Harris (Ky.), 14 S. W. Rep. 343.

The only way for a defendant in ejectment, in Missouri, to obtain the value of improvements made by him in good faith, is to proceed as provided in Rev. St. 1879, §§ 2259, 2260, after judgment against him for possession. County of Jasper v. Mickey (Mo.), 4 S. W. Rep. 424.

The amount for which a purchaser in good faith, of land to which his title fails, must account to the real owner for the use of it while held in good faith, is the true rental value, or such rent as might fairly have been made by a valid lease from year to year, or for a term equal to the period of ouster; and the fact that the land consists of city lots which might have been rented under a perpetual lease can not vary this rule so as to permit the leasing value under leases renewable forever to be taken as the basis for accounting. Worthington v. Hiss, 70 Md. 172; 16 Atl. Rep. 534; 19 Md. L. J. 919 (1889).

Code La., Art. 503, provides that a vendee ceases to be a *bona fide* possessor from the moment defects in title are made known to him. A deed of record purported to convey land to D. and his wife, which by the law in force at the time of its execution made the wife the owner of one undivided half of the land. *Held*, that defendant, to whom D., after having alienated by a deed of record the portion of the property belonging to him, conveyed the

¹ 2 Greenleaf on Evidence, § 337; 168; Griswold v. Bragg, 6 Fed. Rep. Hylton v. Brown, 2 Wash. (U. S.) 342 (1881); Bacon v. Callender, 6 165; Russell v. Blake, 2 Pick. (Mass.) Mass. 301 (1810); Newhall v. Sadler, 17 505; Wood v. Wood, 83 N. Y. 575 Mass. 350 (1821).

(1881); Fenwick v. Gill, 38 Mo. 510 ² McMurray v. Day, 70 Iowa, 671 (1866); Rector v. Gaines, 19 Ark. 70 (1886); Pacquette v. Pickness, 19 Wis. (1857); Coulter's Case, 5 Coke, 30; 219 (1865); Childs v. Shower, 18 Iowa, Green v. Biddle, 8 Wheat. (U. S.) 81; 261 (1865).

Jackson v. Loomis, 4 Cow. (N. Y.)

other undivided half of the land, could not claim to be a "*bona fide* possessor," so as to be relieved from accounting for rents and revenues, on the ground that he was mistaken as to the legal effect of the deed to D. and wife. *Heirs of Dohan v. Murdock*, 41 La. Ann. 494; 6 So. Rep. 131 (1889).

The defendant in the ejectment in either case, will not be permitted to give evidence of the value of the improvements made by him on the land, which were not necessary for the profitable enjoyment of it. *Wykoff v. Wykoff*, 3 Watts & S. (Pa.) 481.

§ 41. **Set-off as to Mesne Profits.**—A set-off can not ordinarily be pleaded to the action for mesne profits. But, where a defendant had made a payment on account of ground rent becoming due subsequently to the day of the demise in the declaration in ejectment, this payment was deducted from the amount of the damages, on the ground that it was an outgoing rent falling due during the time of his occupation, from which he could not exonerate himself, and one which the plaintiff must himself have paid had he been in possession.¹

Where the defendant had a cross-claim against the plaintiff for money expended on the premises, a court of equity granted an injunction to restrain the proceedings at law, because of the absence of the right of set-off in the action for mesne profits. *Cawdor v. Lewis*, 1 Younge & Coll. 427.

In Pennsylvania, defendant is allowed for the value of improvements made in good faith, under color of title, by way of set-off against, or in mitigation of damages for the detention of the land; and the value of betterments can not exceed the amount of plaintiff's damages and mesne profits. *Putnam v. Tyler*, 117 Pa. St. 570; 12 Atl. Rep. 43; *Scates v. Same*, Id. 51 (1888).

Where defendant had neither an equitable nor a legal title to the land in controversy, he is not entitled to a set-off for improvements made by him thereon, beyond the value of the mesne profits. *Fields v. Carlton*, 84 Ga. 597; 11 S. E. Rep. 124 (1890).

§ 42. **When Not Entitled to Improvement—The Rule at Common Law.**—A disseizor against whom a recovery is had on a writ of entry has no remedy, unless given by statute, for any expenditures upon the land, even for rendering it more valuable. Whatever he does is done in his own wrong, and when he is obliged by law to yield the possession, he must surrender the land in its improved state, if he has improved it.² In many States this rule of the common law has been changed by statute,³ and those who desire to avail themselves of the privileges of these laws must bring themselves clearly within this provision and proceed in the mode directed. There may be cases in which a defendant in an action of trespass for

¹ *Doe v. Hare*, 4 Tyrw. 29.

³ *Laws Mass.* 1807, Ch. 75.

² *Russell v. Blake*, 19 Mass. 505 (1824).

mesne profits may have an allowance for expenses incurred in maintaining the tenements in a condition to yield a profit, for it is the net rents and profits only which the plaintiff ought to recover.¹ Keeping up fences to preserve the grass for mowing, labor upon the land to make it productive, etc., would probably be deducted from the gross amount of profit; but new erections or changing the character of the soil are not of this description.²

Applications of the rule—Deepening and walling a well.

In an action of trespass for mesne profits the only question was whether the defendant was entitled to any allowance out of the rents and profits on account of a well which he repaired by digging it deeper and stoning it anew while the premises were in his possession. On the trial the judge instructed the jury that the defendant was not entitled to any allowance on this account, and the verdict was returned accordingly. On this instruction the defendant moved for a new trial. In overruling the motion Parker, C. J., said: "The deduction claimed by the defendant is for repairing a well, digging it deeper, etc. This can not be allowed, for it is altering and making anew the well, which if the defendant choose to do it, must be at his own cost." Parker, C. J., in *Russell v. Blake*, 19 Mass. 505.

In ejectment, where the jury find that the defendants in good faith sunk an oil-well on the land in dispute, believing it to be their land, they are entitled to be reimbursed for the cost of the well out of the proceeds of sale of the oil by a receiver pending the litigation.

The rule that oil is part of the land, and can not be regarded as mesne profits, has no application. Appeal of Phillips, 130 Pa. 572; 18 Atl. Rep. 998; 25 W. N. C. 275 (1890).

§ 43. **Enhanced Rents from Improvements.**—It is now a well settled rule of law that the unsuccessful defendant in an action of ejectment when called upon to respond in damages for mesne profits can not be charged with the increase of rents

¹ Coulter's Case, 5 Coke, 31; Green v. Addison, 215; Dormer v. Fortesque, 3 Biddle, 8 Wheat. (U. S.) 1; Moore v. Atk. 134; Jackson v. Loomis, 4 Cow. (N. Y.) 168; Daquin v. Coisin, 20 Martin (La.), 615. But in case the party claiming for improvements entered upon the land knowing that it was not his own, or if in making

² Russell v. Blake, 19 Mass. 505. Where a person in possession of land in good faith, has made valuable and lasting improvements upon it, the value of the improvements thus made have been allowed to the extent of the rents and profits claimed by the plaintiff in actions of trespass for mesne profits. Marie v. Semple, them he was conscious of a defect in his title, he will not be entitled to recover for them. Freer v. Hardenburgh, 5 Johns. (N. Y.) 272; Strike v. McDonald, 2 Harr. & Gil. (Md.) 191. See further upon this subject, 3 Kent Com., 334, *et seq.*; Stearns on Real Actions, 374.

and profits of the land by reason of improvements made by him thereon. A successful plaintiff is entitled to the rent and profits according to the value of the land for the purpose to which it has been devoted by the defendant. What the land was worth to the defendant is the true measure of compensation. The rule is certainly reasonable. It does not require the unsuccessful defendant to pay rent on improvements made by himself. But it does require him to pay rent according to the increased adaptation of the land for the purpose for which it is used, though such adaptation has been brought about by his own labor. The rule for the true measure of the damages is to estimate a reasonable rent upon all the land brought into cultivation and suitable for the purpose to which it has been devoted, but no rent is to be estimated for the use of buildings, fixtures or other like improvements made by the defendant.¹

§ 44. **Growing Crops.**—The general rule of law governing crops growing upon the premises in controversy, is that when the possession is delivered under a writ of possession the delivery includes the crops growing thereon. The defendant is required to surrender the land in its improved state.² But it seems to be the rule in North Carolina that the successful plaintiff is not entitled to the products of the land, such as fodder, beans, wheat, and the like, which have been severed from the land and stacked or stored in cribs before the writ of possession issued.³

In New York, crops grown upon the disputed land by the tenant, during the pendency of an action of ejectment, belong to the landlord. The commencement of an ejectment for non-payment of rent is equivalent to re-entry, and when possession is gained, it relates back to the commencement of the action. *Samson v. Rose*, 65 N. Y. 411.

¹ *Dungan v. Van Phul*, 8 Iowa, 263; ² *Adams on Ejectment*, 416; *Altes* see *Jackson v. Loomes*, 4 Cow. (N. Y.) 168; *Davis v. Louk*, 30 Wis. 301; *erwick*, 3 Bing. 11; *Hodgson v. Gas-* *Tatum v. McLitton*, 56 Miss. 352; *coigne*, 5 B. & A. 88; *Samson v. Rose*, *Everett v. Tendick*, 44 Tex. 570; *Wol-* 65 N. Y. 411; *Jackson v. Stone*, 13 *cott v. Townsend*, 49 Iowa, 456; *Ad-* *Johns. (N. Y.)* 447; *Morgan v. Varick*, *kings v. Hudson*, 19 Ind. 392; *Neale v.* 8 Wend. (N. Y.) 587; *McLean v. Bo-* *Hagthorp*, 3 Bland (Md.), 551-591; *vee*, 1 Am. Rep. 185; 24 Wis. 295. ³ *Brothers v. Hurdle*, 10 Ired. L. *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Ewing v. Handley*, 4 Litt. (Ky.) 347; *Hawkins v. King*, 1 Mon. (Ky.) 162. (N. C.) 490.

In Georgia, the successful plaintiff in ejectment is entitled to the crops growing upon the plantation, unless he puts in issue and recovers, as mesne profits, the rent for that year. If the rents for the year are included in the recovery of mesne profits, then the defendant must be allowed to gather and carry away the crops. *Gardner v. Kersey*, 39 Ga. 664.

Sections 2712, 2713, Alabama Code, provide that no writ of possession can issue till the end of the year, where defendant executes a bond to plaintiff for the rent, with surety approved by the clerk, and the same is filed in the clerk's office. *Held*, that where the defendant fails to file the required bond the rights of the parties are governed by the common law rule, that one who recovers land in ejectment is entitled to the crops growing thereon. *Carlisle v. Killebrew*, 89 Ala. 329; 6 So. Rep. 756 (1890).

In Wisconsin, where the defendant had, before the suit, recovered possession of the premises, and had been put in possession under the judgment, and had taken possession of a crop of wheat, part of which had been cut, and part of which was uncut at the time he took the land, the defendant in ejectment having brought suit to recover for the taking of the wheat, it was held that, as the wheat was sowed long after the suit to recover the land was instituted, it belonged to the defendant, who was the successful plaintiff in the ejectment suit, and could not be recovered. *McLean v. Bovee*, 24 Wis. 295.

Applications of the rule.

Fernandes recovered a judgment, in an action of ejectment, from which the defendant therein prosecuted an appeal to the Supreme Court, pending which appeal said defendant leased the land to McGinnis, who cultivated the land in corn, which, being matured, was cut and shocked on the land. The judgment in ejectment was affirmed by the Supreme Court and a writ of possession was executed by the sheriff. The land, with the corn in shock being thereon, was delivered to Fernandes. McGinnis brought replevin for the corn, and the cause was submitted to the trial court without a jury. The finding and judgment of the court thereon were for Fernandes, from which McGinnis appealed. The question was, to whom did the corn belong? In delivering the opinion of the court affirming the finding of the lower court, Mr. Justice Wall said: "We think the question was correctly answered by the Circuit Court. By the judgment in the ejectment case it was conclusively determined that the land was owned by the appellee, and that the possession of the lessor of the appellants was unlawful, and so was their possession. They could acquire no rights by such an unlawful possession as against the appellee in anything they might produce on the land. Various authorities are cited by appellants as to the effect of a severance of the products of the soil. Were the question between debtor and creditor, executor and heir, vendor and vendee, different considerations would be involved. For some purposes and as between some parties they are so (personal property), but as between the successful plaintiff in an action of ejectment and the evicted defendant, they are unquestionably a part of the realty. We are unable to see how a severance, unlawfully produced, could change the situation, and give legal value and efficiency to the result of the unlawful act." *McGinnis et al. v. Fernandes*, 135 Ill. 69; 26 N. E. Rep. 109; 32 Ill. App. 424 (1890).

Where the plaintiff was in possession of a tract under a claim of ownership, and upon which he had raised, gathered and stacked a crop of oats, the defendant, who also claimed the land, entered without license, carried away and converted the oats to his own use. After this, he recovered possession of the land, but he was held liable for the value of the crop. *Ray v. Gardner*, 82 N. C. 454; see *Walton v. Jordan*, 65 N. C. 170.

The owner of land held adversely is not the owner of the crops, and can not recover them or their value from one who has received and converted them, and can not recover rent moneys paid to a third person by direction of the adverse holder. *Faulcon v. Johnston*, 102 N. C. 264; 9 S. E. Rep. 394 (1889).

§ 45. **Delivery Under Writ of Possession.**—When the sheriff delivers possession of the land under the writ of *habere facias possessionem*, he thereby also delivers possession of the crops upon it; and such crops will pass to the lessor, although severed at the time of the execution of the writ, provided such severance has been made subsequently to the determination of the tenant's interest, and of the day of the demise in the declaration; and the growing crops will also pass to the lessor by the execution of the writ of possession, although previously seized under a *feri facias* against the tenant, if the day of the demise be prior to the issuing of such *feri facias*, inasmuch as they can not be said to belong to the tenant, who is a trespasser from that day.¹

As between a trespasser and the owner of the land, the crops belong to the latter. *Crotty v. Collins*, 13 Ill. 567; *Altes v. Hinckler*, 36 Ill. 275; *Powell v. Rich*, 41 Ill. 466.

A party entering under a defendant in ejectment takes only his rights. *Oetgen v. Ross*, 47 Ill. 142; *Wetherbee v. Dunn*, 36 Cal. 147; *Harding v. Larkin*, 41 Ill. 233.

§ 46. **Interest as an Element of Damages.**—The right to recover interest depends entirely upon statutory enactments. At common law it was not allowed at all. As a general rule, interest can not be recovered upon unliquidated demands, and hence it follows that interest can not be allowed on demands for mesne profits.² But since the action for mesne profits has come to be treated more as an action upon an implied con-

¹ *Adams on Ejectment*, 416; *Doe d.* 245; *Craig v. Watson*, 68 Ga. 114; *Upton v. Witherwick*, 3 Bing. 11; *contra*, *Brothers v. Hurdle*, 10 Ired. Hodgson v. Gascoigne, 5 B. & A. 88; (N. C.) 490.

McGinnis v. Fernandes, 135 Ill. 69; 32 ² See *Jackson v. Wood*, 24 Wend. Ill. App. 421; 26 N. E. Rep. 109 (1890); (N. Y.) 443; *Vandervoort v. Gould*, 36 N. Y. 647; *New Orleans v. Gaines*, 15 Wall. (U. S.) 624; *Bolling v. Lers-Klein*, 44 Ind. 290; 6 Am. & Eng. Enc. ner, 26 Gratt. (Va.) 36; *Drexel v. Man*,

tract than as an action of tort, the rule as to interest has become somewhat modified.¹

It is proper to charge interest upon estimated rents and profits where the land is occupied by the consent of the owner or where one tenant in common holds and enjoys the whole land of his co-tenant. *Vance v. Evans*, 11 W. Va. 342.

In cases of trover, replevin and trespass, interest on the value of property unlawfully taken, or converted, is allowed by way of damages, for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed, by the wrongful or negligent act of another, may not be included in the damages. *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361; see also *Whitehall, etc., Co. v. Steamboat Co.*, 51 N. Y. 369; *Goddard v. Foster*, 17 Wall. (U. S.) 124; *Brown v. S. W. R. R. Co.*, 36 Ga. 377; *Lindsey v. Danville*, 46 Vt. 144.

A general rule by Senator Spencer.

Where money has been lent, advanced or expended, by request, and under an agreement to pay at a specific time, or where it has been had and received under a like agreement, then the allowance of interest may be safely referred to the principle of an implied contract to pay interest on default; but where no time of payment is fixed, and where the duty to pay arises from the relative situation of the parties, it seems that it should be referred to a jury to determine whether damages shall be given by allowance of interest. *Rensselaer, etc., Co. v. Reid*, 4 Cow. (N. Y.) 597 (1825).

The rule in Sedgwick on Damages.

"On principle, we can see no reason for distinguishing between liquidated and unliquidated demands. If interest is given as damages, it should be given to compensate the plaintiff and not to punish the defendant, and the fact that the amount is unliquidated can not lessen the plaintiff's damages. If anything is due him he has a right to have it paid upon demand, and he loses the interest upon the amount, as much where that amount is unknown as where it is known." *Sedgwick on Damages* (7th Ed.), Vol. II, p. 180, note iii.

In an action of covenant by a grantee who has been evicted on the cove-

2 Pa. St. 276; *Sopp v. Winpenny*, 68 Pa. St. 78; *Low v. Purdy*, 2 Lans. (N. Y.) 422; *Worrall v. Munn*, 38 N. Y. 137; *McCrubb v. Bray*, 36 Wis. 333; *Whisenhunt v. Jones*, 78 N. C. 361; *Love v. Shartzter*, 31 Calif. 487; *Dean v. Tucker*, 58 Miss. 487; *White v. Tucker*, 52 Miss. 145; *Patterson v. Stewart*, 6 Watts & S. (Pa.) 527; *Flint v. Steadman*, 36 Vt. 210; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 125; *Cutter v. Waddingham*, 33 Mo. 269.

¹One who has peaceably taken possession of land is not accountable for its rental value, but only for the rents and profits actually received, or which ought to have been received, under the circumstances; nor is he liable for interest on the yearly value of the rents and profits. Neither should he be charged with rent for years in which the crops were seized under agricultural lien warrants issued at the instance of the owners of the land, the proceeds of which are still in the sheriff's hands. *Garlington v. Copeland* (S. C.), 10 S. E. Rep. 616; *Am. Dig.* 1890, 1193.

nants in his deed, the damages which he is entitled to recover are the consideration money, with interest for such time as he is liable for the mesne profits, and the costs of the ejectment suit against him. *Bennett v. Jenkins*, 13 Johns. (N. Y.) 50 (1816); see also *Staats v. Ten Eyck*, 3 Cai. (N. Y.), 111; *Kerley v. Richardson*, 17 Ga. 602; *Caulkins v. Harris*, 9 Johns. (N. Y.) 324; *Fernander v. Dunn*, 19 Ga. 497; *Clark v. Parr*, 14 Ohio, 118; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 125; *Wager v. Schuyler*, 1 Wend. (N. Y.) 553.

§ 47. **Taxes, Assessments, etc.**—Upon the question of reimbursing the unsuccessful defendant for taxes paid upon the premises in question by him during his occupancy the authorities are not quite uniform, and no general rule can be laid down from the authorities. One class of decisions rests apparently upon the doctrine that as the payments were voluntary the action for money paid does not lie, there being no previous request or subsequent assent;¹ another class, upon the doctrine that even if such payments would seem to create an equity for reimbursement, courts of equity possess no power to exact it;² and still another class, upon the doctrine that the payment of taxes by the defendant upon the premises does not constitute an improvement upon it or add to its value, and therefore is not a matter for which the defendant can be reimbursed.³ There is no good reason why a person who occupies land in good faith, believing himself to be the owner thereof, should not be reimbursed for taxes paid upon the same by him. A principle of equity and justice lies at the foundation of the true rule, and, though obscured for a season by legal technicalities, it will in time develop into the establishment and assertion of the true rule upon this question.⁴

§ 48. **A More Reasonable Rule.**—As the action for mesne profits is given to enable the owner of real property to recover a fair and just compensation for the use and occupation of his land, such rules should be adopted as are best calculated to attain that end. The payment of such taxes is, in reality, the discharge of liens and obligations with which the property

¹ *Napton v. Leaton*, 71 Mo. 358.

² *Marvin v. Lewis*, 61 Barb. (N. Y.) 49.

³ *Curtis v. Gay*, 15 Gray (Mass.) 36.

⁴ One who has entered into possession of land with the understanding that he was to reimburse himself for the amount advanced by him to re-

deem it from a tax sale is entitled, on accounting for the rents and profits, to credit for the amount advanced by him, and also for taxes subsequently paid, and permanent improvements made by him. *Garlington v. Copeland* (S. C.), 10 S. E. Rep. 616; *Am. Dig.* 1890, 1193.

was charged and for which it might have been sold, and the owner's title extinguished had not the taxes been paid. The payment of such taxes is money paid for the preservation of the real owner's title, and to prevent the defendant from having the amount so paid would be to enable the plaintiff to recover more than the reasonable net rents and profits derived by the defendant from the use of the lands. It is but just and proper, in any view of the question, that the taxes thus paid should be deducted from the rents and profits.¹

§ 49. **The Rule for Fixtures.**—A fixture is an article which was a chattel, but which, by being physically annexed or affixed to realty by some one having an interest in the land, becomes a part and parcel of it.² By a recovery of the possession of the land the successful plaintiff in ejectment, as a general rule, is entitled to all the fixtures put upon the land by the defendant or his lessees;³ being part and parcel of the land they go with it.

§ 50. **Costs of the Ejectment Suit an Element of Damages.**—The effect of a judgment in ejectment, whether by default or otherwise, is substantially the same as in personal actions. The form of the proceeding is different, but after judgment the legal consequences are substantially the same. The right of the plaintiff to bring an action for the mesne profits, for the double purpose of obtaining compensation for the use of the land and recovering the cost of the ejectment,⁴ if not recovered in the action itself, is one of these legal consequences. The costs of the ejectment can not, however, be recovered from persons not parties to the suit.⁵

After recovery in ejectment, even by default, against the casual ejector, the lessor of the plaintiff may have his action for the mesne profits against the tenant, both for the use of the land and for the costs of the ejectment. *Baron v. Abeel*, 3 Johns. (N. Y.) 481; *Brown's Lessee v. Galloway*, 1 Pet. (C. U. S.) 291.

¹ *Ringhouse v. Keener*, 63 Ill. 230 (1872). *Ege v. Kille*, 84 Pa. St. 333; *McRea v. Central Bk.*, 66 N. Y. 490.

² 8 Am. & Eng. Ency., 41; 1 Washburn on Real Property, 6; Taylor Land. & Tenant, § 544; Potter v. (1808); Mitchell v. Mitchell, 1 Md. 55 (1851); Holmes v. Davis, 19 N. Y. 411 (1859); Masterton v. Hagan, 17 B. Peckham, 35 Conn. 88; Teaff v. Mon. (Ky.) 325 (1856).
Hewitt, 1 Ohio St. 511.

⁵ *Leland v. Tousey*, 6 Hill (N. Y.) 328.

³ *McMinn v. Mayes*, 4 Calif. 209;

§ 51. **Costs as Damages—The Law Stated by Adams.**—If the costs are stated in the declaration as part of the damages, they must, of course, also be proved in the ordinary manner, and if the ejectment has been defended, his claim is limited to the amount of the taxed costs only. But where the judgment has been obtained by default against the casual ejector, he is allowed to recover reasonable costs, as between attorney and client, and the same principle has been acted upon with respect to costs incurred by the plaintiff in a court of error, in reversing a judgment in ejectment obtained by the defendant, although they were costs which the court of error had no power to allow. And in a case where the defendant in ejectment had appeared and pleaded, and afterward withdrew his plea, the plaintiff was allowed to recover his costs in the action although they had not been taxed.¹

§ 52. **Counsel Fees and Other Like Necessary Expenses.**—It is a general rule of law that the successful plaintiff in an action of ejectment may recover of the defendant not only the reasonable value of the rent and profits but also the costs of the ejectment suit. But the term costs, as here used, includes only the legal and proper costs taxed in the action and not the counsel fees and other like expenses incurred by the plaintiff in the prosecution of his suit.²

§ 53. **Abatement and Revivor.**—The action for mesne profits, when treated as an action of trespass at common law, abates with the death of defendant.³ But in some of the States, notably Pennsylvania and Alabama, the action does not abate with the death of the defendant, but survives against his personal representatives.⁴ And in others it is a matter of statutory regulation.

¹ Adams on Ejectment, 459; Brooke J. 29; Brooke v. Bridges, 7 Moore, v. Bridges, 7 B. Mon. (Ky.) 404, 471; 471; *contra*, Denn v. Chubb, Coxe Doe v. Davis, 1 Esp. 358; Doe v. Hare, (N. J.), 466.

² Dow. P. C. 245; Doe v. Huddart, 4 Dow. P. C. 437; 5 Tyr. 846. ³ Know v. Sterling, 73 Ill. 214; Bunker v. Green, 48 Ill. 243; Stearns on Real Actions, 404; Thompson v.

⁴ White v. Clack, 2 Swan (Tenn.) 230; Doe v. Davis, 1 Esp. 358; Doe v. Hare, 2 Dowl. P. C. 245; Doe v. Filliter, 13 M. & W. 47; Baron v. Abeel, 3 Johns. (N. Y.) 482; White v. Clack, 2 Swan (Tenn.), 230; Aslin v. Parkin, 2 Burr. 665; Symonds v. Page, 1 Cr. & on Real Actions, 404; Thompson v. Bower, 60 Barb. (N. Y.) 463; Jackson v. Wood, 24 Wend. (N. Y.) 443; Evans v. Welch, 63 Ala. 253.

⁴ Arundel v. Springer, 71 Pa. St. 398; Evans v. Welch, 63 Ala. 250; see Cavender v. Smith, 8 Iowa, 360.

CHAPTER XX.

DEFENSES.

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§ 1. **Defenses in Actions of Ejectment.**—The action of ejectment proceeds for the possession of the premises in question, the plaintiff claiming that they have been unlawfully entered into and unjustly withheld from him. Facts which go to disprove either of these propositions make a legal defense to the action.¹

§ 2. **The Defendant May Rely upon His Possession.**—In ejectment the plaintiff must recover on the strength of his own title; the defendant can rely on his possession in entire safety, and unless the plaintiff shows a good title he can not be dis-

¹ St. L., etc., R. R. Co. v. Karnes, 101 Ill. 402 (1882); Stowe v. Russell, 36 Ill. 36; Adams on Ejectment, 33.

turbed in such possession, no matter whether the defendant has title or is a mere intruder and trespasser.¹

§ 3. **Defendant May Demur to the Plaintiff's Case.**—We have seen that it is necessary for the plaintiff, in actions for the recovery of the possession of real property, to show in himself a good and sufficient title to the disputed lands, and that in this he will not be assisted by the weakness of the title of his adversary, for the possession of the latter gives him a right to such possession against every man who can not establish such a title in himself as gives him the right to such possession. The question as to the effect of the plaintiff's evidence, and admitting the facts claimed by him to be true, whether he has shown such a title to exist in him as will entitle him to the possession of the lands in controversy, is a question of law for the court. And for the purpose of presenting this question for decision, the defendant may, when the plaintiff has rested his case, move for a nonsuit or for a peremptory instruction to the jury to find a verdict for the defendant. These motions are sometimes called a demurrer to the evidence, and upon these motions every fact which the evidence tends to prove must be taken as absolutely true in favor of the plaintiff.² As a matter of precaution, the careful practitioner will see that the jury is withdrawn from the court during the entry and discussion of such motions. For obvious reasons such matters should not be discussed in their presence.

§ 4. **The Power of the Court to Direct a Nonsuit.**—When the evidence given at the trial, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.³ Where there is an absence of all evidence against the defendant on the whole issue joined, or on an essential or material part of it, a verdict for the defendant may be directed without hearing his evidence.⁴ But where the evidence tends in any

¹ Breese, J., in *Hague v. Porter*, 45 R. I. 383; *St. Johnsbury v. Thompson*, Ill. 318 (1867); *Raynor v. Timmerson*, 59 Vt. 300; 9 Atl. Rep. 571; *Burke v. 46 Barb. (N. Y.) 518*; *Schauber v. Lee*, 76 Va. 386.

Jackson, 2 Wend. (N. Y.) 13; *Kinney v. Vinson*, 32 Tex. 125. ³ *Randall v. Balt. & O. R. R. Co.*, 109 U. S. 478; 3 Sup. Ct. Rep. 322;

² *Davis v. Davis*, 7 H. & J. (Md.) 36; 27 L. C. P. Co. 1003. *Chandler v. Von Roeder*, 24 How. ⁴ *Parker v. Leman*, 10 Tex. 116; (U. S.) 227; *Wheeler v. Schroeder*, 4 *Everette v. Stowell*, 14 Allen (Mass.),

way to establish the cause of action it is error to take the case from the jury or to direct a verdict.¹

§ 5. **The Defendant May Attack the Plaintiff's Title.**—The defendant may show if he can that the deed upon which the plaintiff bases his right to a recovery was in fact a mortgage, or is fraudulent and void, and he may introduce evidence of any matter tending to estop or conclude the plaintiff from setting up his title, or that will show that the defendant is entitled to the possession of the premises in dispute and not the plaintiff.² And the fact that the deed was a mortgage or is fraudulent and void may be proved the same as any other fact which affects the title in an action of ejectment.³

§ 6. **The Burden of Proof—Defenses.**—The burden of proof is upon the plaintiff in the first instance to show such a *prima facie* case as will in law entitle him to a recovery. This being done, the plaintiff may rest and the burden of overcoming the plaintiff's case is upon the defendant. The order of proof is not important.⁴ The most common defenses in actions of ejectment, are :

(1) *Alienage*: In those jurisdictions where aliens are not permitted to own or hold real property the defendant may, if such is the fact, show that the plaintiff is an alien.

(2) *Fraud*: If the conveyance under which the plaintiff claims title was obtained in fraud of the rights of others, the defendant in a proper case may plead the fraud and defeat the recovery.

(3) *An outstanding title*: In cases where the real title to the lands in controversy is in a third person, the defendant may establish such title, and thus show that the plaintiff is not en-

32; Steinmetz v. Wingate, 42 Ind. N. W. Rep. 623 (1881); Adams on 574; Mullally v. Austin, 97 Mass. 30; Ejectment, 378; Hambleton v. Wells, Singleton v. R. R. Co., 41 Mo. 465; 2 Call (Va.), 213; Torrey v. Bardsley, Rigby v. Norwood, 34 Ala. 129; 4 Wash. (U. S. C. C.) 242; Jackson v. McCracken v. Roberts, 19 Penn. St. Ogden, 4 Johns. (N. Y.) 140; Mather v. Hutchinson, 25 Wis. 27.

¹ Drakely v. Gregg, 75 U. S. 409; ³ Kent v. Agard, 24 Wis. 378; Hickman v. Jones, 76 U. S. 551; Dobbs v. Kellogg, 53 Wis. 448; 10 N. Stephens v. Brook, 2 Bush. (Ky.) 137; W. Rep. 623 (1881).

Kelsy v. Oil Co., 45 N. Y. 505; Way ⁴ Bancroft v. Chambers, 10 Kan. 364 v. R. R. Co., 35 Iowa, 585; Memphis, (1872); Hipp v. Forrester, 7 Jones L. etc., R. R. Co. v. Bibb, 37 Ala. 699; (N. C.) 599 (1860); Langley, Lessee, v. Hill v. Canfield, 56 Penn. St. 454. Jones, 26 Md. 462 (1866); Murray v.

² Dobbs v. Kellogg, 53 Wis. 448; 10 Bossier, 10 Mart. (La.) 293 (1821.)

titled to the possession of the lands sought to be recovered in the action.

(4) *Former adjudication in bar*: If the matter in controversy has been previously adjudicated upon, it is *res adjudicata* and the defendant may plead it in bar of the action.

(5) *A disclaimer*: If the defendant, in fact, has no interest in the lands in controversy, he may disclaim, and if done in good faith, avoid the payment of costs and possibly the liability to respond in damages by way of mesne profits.

(6) *The right of homestead*: Where the conveyance under which the plaintiff claims his title does not release the right of homestead in the manner pointed out by the statute, the right still exists, and the defendant may in a proper case plead it in bar of the action.

(7) *Estoppels in pais*, or, as they are frequently called, equitable estoppels, are available as defenses in actions of ejectment in all cases where they exist and are pleaded as such.

(8) *Equitable defenses*: In those States where the distinction between equity and law is abolished, equitable defenses are often available in actions of ejectment. In the Federal courts and the courts of Illinois, and some other States where this distinction still exists, as a rule, the equitable defense can not be pleaded to the action. The aid of the equity court must be invoked, and the proceeding at law stayed until the equitable rights of the defendant are determined.

(9) *The statute of limitations*: In cases where the defendant occupies the premises in adverse possession, he may plead the bar of the statute of limitations, and if his possession is sufficient under the law, a grant will be presumed to exist.

(10) *Dedication*: Municipal corporations and other corporations of a public nature, frequently acquire real property by dedication, and under this doctrine defenses to actions of ejectment are maintainable.

§ 7. **Alienage of the Plaintiff.**—In some States aliens are prohibited by statutory enactments under certain conditions from acquiring title to, or taking, or holding any lands or real estate by descent, devise, purchase or otherwise. The statutes recognize alienage and its effects, but they rarely define the term. We must, therefore, look to the common law for its definition. By the common law, to make a man an alien he

must be born without the alienage of the country, although persons may be naturalized or expatriated by statute or have the privileges of subjects conferred upon them or secured to them by treaties or national compacts. Under these laws the question whether the plaintiff be or be not an alien can only be raised by plea in abatement. To such a plea he may reply by a general denial, naturalization, or confess and avoid the plea by bringing himself within the provisions of some statute, treaty or national compact.¹

In *Langdon v. Potter*, 11 Mass. 316, Jackson, J., said: "The plea of alien friend is always in abatement." But in his book on Real Actions, (p. 60), he says: "The common opinion with us has been that this fact (alienage) must be pleaded in disability, and never in bar; yet this plea, if supported, shows that the demandant can not maintain any action at any time for the land in question, and this answers exactly to the common description of a plea in bar; and even in the times of ancient strictness, it has been said that it might be pleaded either to the action or to the person. Thel. Dig. L. 15, C. 4, § 4; 32 H. 6, 23; 10 H. 7; 11 Bro. Bar. 64, 102; Doct. plac. 298. In the case of *Hutchison v. Brock*, (11 Mass. 119), it is suggested by Sewall, C. J., that, in a real action, alienage may be pleaded either in abatement or in bar, and the reason assigned is, because it shows that for that cause of action the demandant had no right to recover; that is, the alienage produces not merely a present disability to bring or to maintain an action, but a perpetual bar of the supposed right of action." He concludes by saying that he presumes it would now be decided that alien friend might be pleaded in bar to a real action. Jackson on Real Actions, 60.

§ 8. **Fraud—Actual and Constructive.**—(1) Actual or positive fraud is defined by Story as any cunning, deception or artifice used to circumvent, cheat or deceive another.² In his treatise on Torts, Judge Cooley says it is any deception practiced in order to induce another to part with property or to surrender some legal right and which accomplishes the end designed.³ It may consist in a *suggestio falsi*, a statement of what is false, or in a *suppressio veri*, a concealment of what is true.

(2) Constructive fraud is fraud inferred from the relation of the parties and the circumstances by which they are surrounded, regardless of any actual dishonesty of purpose or evil design.⁴

¹ *Ainslie v. Martin*, 9 Mass. 454 ⁴ 8 Am. & Eng. Ency. 635; Story's (1813); *Martin v. Woods*, Id. 377 (1812). Eq. Juris., § 255; *People v. Kelley*, 35

² Story's Eq. Juris., § 136.

Barb. (N. Y.) 457.

³ Cooley on Torts, 474.

§ 9. **Fraud Vitiates all Acts Between the Parties to It.**—Fraud, it is said, vitiates all acts as between the parties to it; nor can there be a doubt that fraud is cognizable in a court of law as well as equity. It is an admitted principle that a court of law has concurrent jurisdiction with a court of equity in cases of fraud. If a deed has its inception in fraud, it is certainly competent for the defendant to show the fact. Common law courts may entertain jurisdiction of questions of fraud, and a conveyance, whether it be by deed from an individual or by a patent from the government, although executed with all the forms of law, when obtained in fraud of the rights of others may, in an action of ejectment, be disregarded by the court as void at the instance of the injured party, or those holding under him.¹

It is a good defense to an ejectment that plaintiff's title is derived from a conveyance to her in fraud to her grantor's creditors, one of whom afterward obtained a judgment, and issued execution under which the land was sold to defendant's predecessor in title, such fraudulent conveyance being void by the State statutes. *DeGuire v. St. Joseph Lead Co.*, 38 Fed. Rep. 65.

After land has been sold under a deed of trust to secure the purchase money, and repurchased by the vendor, the vendee, having retained possession of the land, can not defend ejectment by the vendor on the ground of fraudulent misrepresentations by the vendor inducing the first sale, as, upon discovery of the fraud, he should have repudiated the purchase, and surrendered possession of the land. *Crumb v. Wright*, 97 Mo. 13; 10 S. W. Rep. 74 (1888).

§ 10. **Fraud in the Execution of a Deed.**—The rule is familiar, wherever the distinction between law and equity is preserved, that in a trial at law, fraud in the *execution of a deed* may be given in evidence, as that, through misreading, or the substitution of one paper for another, or by other device or trickery, he was induced to execute it, believing, at the time, that he was executing something else; and it may also be proven that what purports to be a deed is in truth not a deed, but a forged instrument; but it can not be proved that the transactions which preceded and induced the execution of the deed were fraudulent. Where a party knowingly and voluntarily signs a deed, although he does so in violation of his duty and of the laws, or be induced thereto by the fraudulent contrivances of others, yet, if it be such upon its face as will

¹ *Kirkpatrick v. Clarke*, 132 Ill. 342; *Brent*, 5 Gill. (Ill.) 573; *Jameson v. 24 N. E. Rep.* 71 (1890); *Rogers v. Beaubien*, 3 Scam. (Ill.) 113.

convey title, it can only be impeached and set aside, and parol evidence will be received for that purpose, in a court of equity.¹

§ 11. **Fraud as Between Parties—When a Defense.**—In ejectment to recover the possession of real property, the defendant may defeat a recovery by showing that the plaintiff's deed was made to him for the purpose of hindering, delaying and defrauding the creditors of the defendant, or for any other illegal purpose. It is a general rule, subject to some exceptions, that when parties are concerned in illegal agreements, they will be left without remedy against each other, provided they are *in pari delicto*. The law refuses to aid either party but leaves them where it finds them. This rule is applied to executed transactions as well as to executory, and is enforced by courts of law as well as courts of equity.²

By the common law, deeds of conveyance, or other deeds, made contrary to the provisions of a general statute, or for an unlawful consideration, or to carry into effect a contract unlawful in itself, or in consequence of any prohibitory statute, are void *ab initio* and may be avoided by plea, or on the general issue of *non est factum*. The illegality may be given in evidence, to show that the writing executed by the defendant is not a deed by any legal construction or effect. *Phelps v. Decker*, 10 Mass. 274.

§ 12. **Parties to Illegal Agreements Left Without Remedy, etc.**—It is a general rule, subject, it is true, to certain exceptions, that, where parties are concerned in illegal agreements, they are left without remedy against each other, provided they are *in pari delicto*. The law, in such cases, refuses to lend its aid to either party, but leaves them where it finds them, to suffer the consequences of their illegal or immoral acts. This rule is ordinarily expressed by the maxim, *ex dolo malo, or ex turpi causa, non oritur actio*, or by the maxim, *in pari delicto potior est conditio defendentis et possidentis*. These maxims are applied to executed transactions as well as to those which are executory, and are enforced by courts of law as well as courts of equity.³ As said by Chan-

¹ Scholfield, J., in *Windett v. Hurlbut*, 115 Ill. 405 (1885); *Kerr on Fraud and Mistake* (Bump's Ed.), 332; *Story Eq. Juris.*, § 437; *Taylor v. King*, 6 Munf. (Va.) 358; 8 Am. Dec. 748; see also *Graham v. Anderson*, 42 Ill. 514; *Dawson v. Hayden*, 67 Ill. 52; *Rice v. Brown*, 77 Ill. 549; *Chapin v. Billings*, 91 Ill. 539; *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

² *Kirkpatrick v. Clark*, 132 Ill. 342; N. E. Rep. 71 (1890); *Phelps v. Decker*, 10 Miss. 274 (1813); *McCullan v. Gomby*, 8 Johns. (N. Y.) 147; *Story Eq. Juris.*, § 298.

³ *Kirkpatrick v. Clark*, 132 Ill. 342; 24 N. E. Rep. 71 (1890); *Smith v. Hubbs*, 10 Me. 71.

cellor Walworth,¹ "Whenever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct."

§ 13. **Distinction Between Executory and Executed Contracts.**—It should be stated in this connection that there is a marked and settled distinction between executory and executed contracts of a fraudulent or illegal character. Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute, or pay damages for not executing, but in both cases leaves the parties where it finds them. The object of the law in the latter case is, as far as possible, to prevent the contemplated wrong, and in the former to punish the wrongdoer by leaving him to the consequences of his own folly or misconduct.² In a Georgia case³ this precise question was presented. The action was ejectment, and the plaintiff claimed title under a deed executed to him by the defendant; and the evidence tended to show that said deed was executed by the defendant without consideration, and for the purpose of defrauding the grantor's creditors. The defendant asked the court to charge the jury, among other things, in substance, that if said deed was executed by him to defraud his creditors, and that he remained in possession, the transaction was fraudulent, and the defendant could not be ousted of possession, as the court would not aid a party to a fraud to assert rights against the other party, and would not disturb the possession. This charge the court refused to give; and, there being a verdict and judgment for the plaintiff, it was held on appeal that the refusal of the court to charge as requested was error. The point thus raised is discussed in its opinion as follows: "On looking into the cases upon this subject we are

¹ Bolt v. Rogers, 3 Paige, 154.

tain, 3 Ga. 176; Carey v. Smith, 11

² Kirkpatrick v. Clark, 132 Ill. 342; Ga. 539; White v. Crew, 16 Ga. 416; 24 N. E. Rep. 71 (1890); Smith v. 1 Story Eq. Jur., § 298. Hubbs, 10 Me. 71. See, also, Miller v. Marckle, 21 Ill. 152; Nellis v. approved in Kirkpatrick v. Clark, Clark, 20 Wend. 24; Howell v. Foun- 132 Ill. 342; 24 N. E. Rep. 71 (1890).

satisfied that the rule *in pari delicto* applies to the condition of a defendant in a suit, even though he sets up his own fraud. He is in possession, and the courts will not aid the other party to get possession under a fraudulent deed. They will even permit the defendant to say, 'The deed under which the plaintiff claims is a fraud, the result of evil practices between him and me;' and if this be made out by the proof the plaintiff can not recover."

§ 14. **An Outstanding Title in a Third Person.**—The defendant may show that either the legal title or right to possession is in a third person and so defeat the action; excepting of course those cases in which the defendant is estopped from disputing the plaintiff's title. As a general principle, an outstanding title in a third person, superior to that of the plaintiff, is sufficient to defeat a recovery in ejectment, although the defendant may not be able to connect himself with that title. Proof of such title shows the right of entry to be in another than the plaintiff. It is a fundamental rule that the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary.¹

A defendant who sets up an outstanding title in a third person as a defense to an action for the recovery of the possession of real property must show that such title is still a living and effective title, not barred by the statute of limitations or in any other way ineffectual or void.²

The defendant, if he did not enter under the plaintiff, may show title out of him without connecting himself with it. *Bloom v. Burdick*, 1 Hill (N. Y.), 130.

¹ *Adams on Ejectment*, 33; *Raynor v. Timerson*, 46 Barb. (N. Y.) 518; *Harvey v. Morton et al.*, 36 Miss. (7 Geo.) 411; *McDonald v. Schneider*, 27 Mo. 405; *Dickinson's Lessee v. Gillett v. Stanley*, 1 Hill (N. Y.) 121; *Schauber v. Jackson*, 2 Wend. Collins, 1 Swan (Tenn.), 516; *Hunter v. Cochran*, 2 Barr (Pa.), 105; *Peck v. Carmichael*, 9 Yerger (Tenn.), 325; *Greenleaf's Lessee v. Birth*, 6 Pet. (U. S.) 302; *Den Demise Penton v. Sinnicksón*, 4 Hals. (N. J.) 149; *Jackson v. Scharler*, 7 Cow. (N. Y.) 187; *Lessee Foster v. Joice*, 3 Wash. U. S. C. C. 498; *Jackson v. Todd*, 6 Johns. (N. Y.) 258; *Jackson v. Har- der*, 4 Johns. (N. Y.) 211; *Hall v. Gittings*, 2 Har. & J. (Md.) 122.

² *Whiting v. Butler*, 29 Mich. 124; *Totten v. James*, 55 Mo. 494; *Wade v. Thompson*, 52 Miss. 367; *Lannan, Lessee, v. Wilson*, 30 Md. 537; *Hoag v. Hoag*, 35 N. Y. 473; *Griffin v. Sheffield*, 38 Miss. (9 Geo.) 359;

A claim or title which could not be set up by a person while in possession can not be set up by another person who comes into possession under him. *Jackson v. Harder*, 4 Johns. (N. Y.) 202.

§ 15. **Character of the Outstanding Title.**—The plaintiff having in the first instance established his right to the possession of the lands in controversy, by showing a *prima facie* title, it is incumbent on the defendant, if he relies upon an outstanding title for the purpose of defeating the action, to positively and clearly establish such title as an actual subsisting and better title than the plaintiff's title—such a title as would enable the third party himself to maintain an action for the possession of the lands in controversy against both the plaintiff and defendant.¹

The defendant set up, as a defense to an action of ejectment, an outstanding title in his wife. The title was that which she derived through the conveyance of himself and wife to M., and by M. to her, executed after the execution and delivery of the mortgage to W., and after foreclosure proceedings thereon had been instituted. It was held, all that defendant had then to convey was a mere equity of redemption, and that was all that his wife or her grantor took by such conveyance, and which can not prevail against the legal title in an action at law. *Taylor v. Adams*, 115 Ill. 571 (1886); *Aholtz v. Zellar*, 88 Ill. 24; *Wales v. Bogue*, 31 Id. 464; *Kruse v. Scripps*, 11 Id. 98; *Fleming v. Carter*, 70 Id. 283; *Fischer v. Eslaman*, 68 Id. 78.

In ejectment, defendant may, without special plea, show a superior outstanding title, with which he is not himself connected. *Bleidorn v. Pilot Mountain Coal & Min. Co. (Tenn.)*, 15 S. W. Rep. 737; *Am. Dig.* 1891, 1389.

Where defendant in ejectment is not a mere trespasser, but claims title by deed from one in possession at the time of making the deed, he may set up a paramount title outstanding in a third person. *Stephenson v. Reeves (Ala.)*, 8 So. Rep. 695; *Am. Dig.* 1891, 1389.

Where a party enters into the possession of land under a particular title, he can not set up title in a stranger as a defense to a suit brought by the owner of the title under which he entered, to recover possession. *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; *Jackson v. Stewart*, 6 Johns. (N. Y.) 34; *Jackson v. De Walts*, 7 Johns. (N. Y.) 157.

If the recognition of B's title, by A, in possession, was the fruit of mistake or imposition, A may show title in a third person. *Jackson v. Cuerden*, 2 Johns. C. (N. Y.) 353; *Jackson v. Spear*, 12 Wend. (N. Y.) 401.

A mere naked possessor can not deny the validity of a statute foreclosure, though *ex parte*, upon the ground that the mortgage was presumptively paid before the foreclosure was had. *Jackson v. Slater*, 5 Wend. (N. Y.) 295.

One who takes possession under a quit-claim from A is not thereby

¹ *McDonald v. Schneider*, 27 Mo. Lessee v. *Wilson*, 30 Md. 536 (1869); 405 (1858); *Griffith v. Bradshaw*, 4 Adams on Ejectment, 33. Wash. (U. S.) 171 (1821); *Lannan's*

estopped from denying that A had good title. The plaintiff brought ejectment, claiming title under a sheriff's deed of the right, title and interest of A, and showed that the defendant had taken possession under a quit-claim deed delivered after the docketing of the judgment. *Held*, that the defendant might show that A was a mere tenant at will, and that he himself had title. *Bigelow v. Finch*, 11 Barb. (N. Y.) 498.

§ 16. **A Trespasser Can Not Plead an Outstanding Title.**—The defense of an outstanding title in a third person must be pleaded by the defendant in defense of his possession and in good faith. If his possession is the result of a mere trespass or an unlawful intrusion upon the plaintiff's possession, the fact that some other person has a better title will not justify his act.¹

A trespasser without title, who has forcibly dispossessed one in possession under claim of title can not, when sued by the latter in ejectment, set up an outstanding title in a third person, or a title acquired by himself pending the suit. *Anderson v. Gray* (Ill.), 25 N. E. Rep. 843; *Am. Dig.* 1891, 1389.

A mere trespasser or intruder on lands which are within the indemnity limits of a grant to one railroad company can not set up that fact as a defense against a patent of the United States to another company. *Foss v. Hinkell*, 78 Cal. 158; 20 Pac. Rep. 393.

Where a certificate is absolutely void, defendant in ejectment can attack the title of the company claiming under it without in any way connecting himself with the title to the land, or showing that he is no other than a mere trespasser. *Severens, J., dissenting. Lake Superior Ship Canal, Railway & Iron Co. v. Cunningham*, 44 Fed. Rep. 819.

In an action of ejectment, where the defendant was a mere trespasser who had neither entered nor occupied under the plaintiff, it was held that he might, without connecting himself with the title of the plaintiff, show such title to be out out of him and in some third person and thus defeat the action. *Gillett v. Stanley*, 1 Hill (N. Y.) 121 (1841).

§ 17. **A Defendant in Possession May Purchase an Outstanding Title.**—A defendant in possession of premises may always protect himself by buying in an outstanding title, and so may his grantor for his, the defendant's, benefit. This rule is founded upon the principle that the possession follows the paramount title.²

The party in possession, or his grantor, may always buy in an outstanding title for his benefit. A conveyed to B; C purchased from a pretended

¹ A mere trespasser or intruder can not protect himself by setting up an outstanding title in a stranger. *Jackson v. Harder*, 4 Johns. (N. Y.) 202; *Lucy v. Tenn. Ry. Co. (Ala.)*, 8 So. Rep. 806 (1891); *Foss v. Hinkell* (Calif.), 20 Pac. Rep. 393.

² A person in possession of land, claiming title, may purchase in an outstanding title to protect his possession. *Jackson v. Smith*, 13 Johns. (N. Y.) 406.

owner, and conveyed to D, who took possession: A then deeded to E, and C purchased the title. *Held*, that D could defend against B upon the ground of the acquisition of A's title, the deeds to E and from E to C having been recorded before, and without notice of A's deed to B. *Jackson v. Given*, 8 Johns. (N. Y.) 137.

§ 18. **Outstanding Title by Lease—The Right of Possession in a Third Person.**—The plaintiff must rely upon the strength of his own title and not upon the weakness of that of the defendant. If the defendant in possession has no paper title to the lands in dispute he has still the undoubted right to show the title out of the plaintiff.¹ The plaintiff must also have a right to the possession—that is to say, he must have a right of entry upon the lands at the time of the demise in the declaration, or, as we say under our modern practice, a right of possession, at the time of the commencement of the action, and whatever takes away this right of entry or possession will also deprive the plaintiff of his remedy by ejectment, although the legal title still remains in him.² It is said a tenant's right of possession becomes complete on the day fixed by his lease for the commencement of the term, and when that day arrives he is entitled to the possession of the premises in the same condition that they were on the day of the demise, and if the possession is withheld he may maintain an action of ejectment against either the landlord, or a stranger who wrongfully withholds the possession from him.³ Where lands were leased by the owner to a tenant, and the tenant is unable to obtain possession by reason of a former tenant wrongfully holding over after his term, under a former lease, has expired, the right of possession is in the later tenant alone, and he must bring the action.⁴ From the authorities it appears that the right of possession in such cases is in the lessee and not in the owner of the lands, and, therefore, where the owner of lands, having previously leased them, brings his action for the recovery of the possession, the defendant in possession may, if he can, plead the outstanding lease and right of possession in another; that by reason of it the plaintiff was not entitled to the right of possession at the time of the commencement of the action, and so defeat the right of the plaintiff to maintain the action.⁵

¹ *Cobb v. Lavalle*, 89 Ill. 331 (1878).

² *Adams on Ejectment*, 34.

³ *Taylor's Landlord and Tenant*, Ed. 441; *Gazzolo v. Chambers*, 73 Ill. 75. of 1866, § 177.

⁴ *Cobb v. Lavalle*, 89 Ill. 331 (1878); *Cincinnati v. White*, 6 Wall. (U. S.)

⁵ *Cobb v. Lavalle*, 89 Ill. 331 (1878).

§ 19. **A Mortgage After Condition Broken Not an Absolute Outstanding Title, etc.**—A mortgage, even after condition broken, is not an absolutely outstanding title of which a stranger can take advantage and defeat a recovery in ejectment by the mortgagor or one claiming under him. It is available for the mortgagee or his tenant, but not for the tenant of the mortgagor. It may be that the defendant might have shown that he had attorned to the mortgagee after the condition broken, and thus defended his possession under the mortgage. The defense then must rest entirely on the judgment of foreclosure.¹

A mortgage, before foreclosure or entry, is not a legal title which a stranger can set up. *Collins v. Torrey*, 7 Johns. (N. Y.) 278; *Jackson v. Pratt*, 10 Johns. (N. Y.) 381.

Where no possession had been taken under a mortgage, nor any interest paid, nor steps taken to enforce it, for nineteen years, *held*, not to be a subsisting outstanding title, and that a jury might presume it satisfied. *Jackson v. Pratt*, 10 Johns. (N. Y.) 381.

§ 20. **Deed of Trust Not an Outstanding Title, When.**—A deed of trust from a plaintiff in ejectment to secure the payment of a note, with a power of sale in case of failure to make the payment, but which contains a provision that the grantee may hold the premises until a sale is made, can not be set up as an outstanding title where no sale has been made under it.²

§ 21. **Former Adjudications in Bar.**—In every action the verdict is conclusive as to the subject-matter of the suit, and any matter particularly put in issue and found by the jury. And it will not be competent for a party in any other action to deny or plead anything to the contrary of what has been so found and adjudicated. Thus, if the demandant in a writ of entry has a judgment against him by the tenant in a writ of trespass *quare clausum fregit*, upon an issue of soil and freehold, he can not be permitted to say, that, at the time when the action of trespass was commenced, the soil and freehold were not in the tenant. So, if the tenant in a writ of right had be-

¹ *Caton, C. J.*, in *Hall v. Lance*, 15 Ill. 284; *Bartlett v. Borden*, 13 Bush (Ky.), 281 (1861); *Weston v. Spiller*, 2 Allen 45; *Johnson v. Houston*, 47 Mo. 227; (Mass.), 125 (1861); *Jackson on Real Den v. Dimon*, 5 Halst. (N. J. Law) Actions, 143; *Curtis v. Francis*, 9 Cush. 157; *Emory v. Keighan*, 88 Ill. 482; (Mass.) 443; *Raynor v. Wilson*, 6 Hill 102; *Oldham v. Pflieger*, 84 Ill. 102. (N. Y.) 469; *Hardwick v. Jones*, 65 ² *Holbrook v. Debo*, 99 Ill. 372 Mo. 54; *Woods v. Hilderbrand*, 46 Mo. (1881).

fore prevailed against the demandant in a writ of entry, on a plea of nul disseizin, the demandant can not be permitted to say, contrary to the verdict, that the tenant had disseized him. He must go to trial upon his writ of right, with the disadvantages arising from the former verdict against him, and he must establish his right of property in the writ of right (which he was not called upon to establish in the former action) or he can not prevail.¹

§ 22. **The Subject Discussed.**—The law giving consecutive remedies for injuries to real estate, is recognized in all the books that treat upon real actions. It is stated by a distinguished writer upon English law.² He recommends to begin with the lower rather than the higher remedy, for, says he, “A recovery in that of a lower nature will not be a bar to an action of a higher nature, and therefore it is not prudent to sue forth a writ of right when you may have a writ of entry.”

Lord Coke states the law in *Ferrer's Case*³ as it existed in his time and as it exists at the present day except where modified by statutory enactments. The case in question was trover for an ox. There was no necessity for the court to have decided the various matters which are resolved in the case; but if we should strike out of Lord Coke's reports all of the readings and resolutions not necessary for the decision of the particular case, an immense proportion of the common law there digested and clearly stated would be lost, unless with infinite labor it should be collected again from the year books and other black letter authorities. In this celebrated case it was resolved that there is a difference between real and personal actions; that in personal actions the bar is perpetual, for the plaintiff can not have an action of a higher nature; but if the demandant be barred in a real action by judgment upon verdict, demurrer, confession, etc., yet he may have an action of a higher nature and try the same right again, because it concerneth the freehold and inheritance.⁴

But a bar in one action is a bar to another of the same nature; as of actions wherein the demandant declares upon his own

¹ *Arnold v. Arnold*, 17 Pick. (Mass.) 4 (1835). *Arnold v. Arnold*, 17 Pick. (Mass.) 4 (1835).

² Booth on Real Actions, 1.

⁴ *Arnold v. Arnold*, 17 Pick. (Mass.)

³ Roscoe on Real Actions, 213; *Ferrer's Case*, 6 Coke, 7; Cro. Eliz. 668; 10 (1835).

possession, judgment in one shall bar another, so in actions ancestral, where the demandant counts upon the seizin of his ancestor, judgment in one shall be a bar to another. It is not perfectly exact to say that the same right or the same matter is tried in the higher action which was before tried in the action of a lower degree.

It is not strictly so, for the causes of action in trespass *quare clausum fregit*, and in the various writs of entry, relate to the right of possession and of entry. But in a writ of right the demandant counts upon a fee simple and a forfeiture. It is the appropriate and highest remedy for an injury to the right of property. It is true, indeed, that all these actions may relate to the same lands. In that sense only is the same matter tried again, but each presents a different cause of action.

And the same evidence may be competent to prove the issues in trespass, entry, and the writ of right. For example, suppose that A claims the land by a deed from B, bearing date ten years before A's writ of trespass, and that B claims the land by a descent from his father as his sole heir, and a possession of forty years. A may bring his action of trespass *quare clausum fregit* against B. A may give his deed in evidence on an issue of soil and freehold pleaded. Suppose that B denies that he ever made the deed to A, and brings witnesses to prove that it is a forgery; and that A brings witnesses to prove the deed; now, if the jury believe A's witnesses, he will recover his damages for the trespass. If they believe B's witnesses, B will recover his costs. Well, suppose the jury believed B's witnesses and A lost the case. A might afterward bring his writ of entry upon his own seizin within ten years, and offer his deed and the same witnesses to prove it, which he produced on the trial of the question of soil and freehold in the writ of trespass. If the jury believed them, it would find that B had disseized A, and A would have judgment for his possession. If the jury believed B's witnesses, they would find that he had not disseized A, and B would recover his costs. Still the right of property remains to be tried. There has not been any issue upon that question, and there has not been any issue upon the deed. A may afterward sue his writ of right, and produce the same deed and the same witnesses to prove it, and if the jury should believe the evidence produced by A, they would find

that he had better right to recover than B had to hold, and A would have judgment to recover the land.

But suppose that A in his writ of entry had specially set forth B's deed, and alleged that thereby he became seized, and that afterward B disseized him, and that B should have pleaded that it was not his deed, and the jury should have found that it was not his deed. If A should afterward sue his writ of right, he could not avail himself of the deed in evidence in support of his action, because of the verdict against the deed in the former trial; and if A had no other evidence to prove his right, he would not prevail. The former verdict upon the issue of *non est factum* would be conclusive against A upon that point.

But where the deed was offered only in evidence, and no issue was joined upon it, the party is not precluded from offering it again, with such competent evidence as he may have to support it, in any subsequent action between the same parties. Lord Ellenborough said: "The plea (*liberum tenementum*) would be conclusive, that, at the time of pleading it, the soil and freehold were in the defendant, and if properly pleaded by way of estoppel it would estop the plaintiff from alleging to the contrary. But if not brought forward by plea, but only offered in evidence, it would be material evidence, indeed, that the right of freehold was at the time as found, but not conclusive between the parties, as an estoppel would be."¹

To a writ of right, says Booth, "a man may plead the special matter (as a recovery in assize) and conclude to the right, *et sic melius droit, et ponit se sufer assisam, utram*, etc., for a recovery in bar can not be in bar of a writ of right because it only fortifies and evidences the right of possession, but not the mere right."²

Any fact settled by the pleading and a judgment on a verdict in any action, can not be denied by the party against whom it was found, in any subsequent action between the same parties. But the parties are concluded only as to the fact distinctly pleaded and put in issue.³

If the same cause of action has been once tried, it shall not

¹ *Autram v. Morewood*, 3 East, 351. 4 (1835); *Spooner v. Davis*, 7 Pick.

² *Booth on Real Actions*, 113. (Mass.) 149.

³ *Arnold v. Arnold*, 17 Pick. (Mass.)

be tried again; the judgment shall be conclusive upon the parties as to the subject-matter of the action; this rule applies as well to real as to personal actions.¹ We must, therefore, ascertain, in every case where a judgment in a former action is pleaded in bar, precisely what was judicially settled in the former action and what was the cause of that action, and what is the cause of the action to be tried. There are no degrees in personal actions, but the right of property; the whole subject-matter in controversy would be settled and finally determined in the single proper personal action which the party injured should elect to bring.²

But in actions touching the realty we have seen that the parties injured may proceed *gradatim*. The causes of action set forth in the possessory actions would relate only to and conclude only as to right of possession and of entry, while the cause of action in the writ of right would be for a forfeiture from the fee simple estate. And these causes of action, although relating to the same, and although the same evidence might be relevant in each, are as essentially different from each other as a limited differs from an absolute right.³

§ 23. **The Judgment in Bar—The Rule Stated by Mulkey, J.**—A judgment at law, whether in an ejectment suit or in some other form of action, is conclusive on the parties upon all questions, titles and rights involved in the litigation and passed upon by the court, which the court had power and jurisdiction to hear and determine, and nothing more; and whenever the same questions or the same rights or titles are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them, and they will not be permitted to open up the controversy again. The rule, as

¹ *Kitchin v. Campbell*, 3 Wils. 304; 304; Vin. Abr., Bar, (A.) Pl., 20; Com. 2 W. Bl. 827; *Rice v. King*, 7 John. Dig., Action, L.; Doctr. Plac. 65; (N. Y.) 21; *Arnold v. Arnold*, 17 Pick. Fitz. N. B. 1; *Peake on Evid.* (Norris' Ed.), 64, 72, notes; 11 Petersd.

² Com. Dig., Tit. Action, 113; *Arnold v. Arnold*, 17 Pick. (Mass.) 4 (1835).
Abr., 704, note, and 712, note a; *Stearns on Real Actions*, 81, 82; *Jackson on Real Actions*, 15, 283; *Roscoe*

³ *Putnam, J., in Arnold v. Arnold*, 17 Pick. (Mass.) 4 (1835); see also 8 *American Jurist*, 51, 330; *Hitchen v. East*, 355; *Smith v. Sherwood*, 4 *Campbell*, 2 W. Bl. 827; S. C., 3 Wils. Conn. 276; *Blackham's Case*, 1 Salk.

thus stated, goes to the very utmost extent of the doctrine of *res judicata*.¹

Application of the rule—A judgment not a bar, etc.

Hawley and Reed recovered judgment against Simmons. Executions were issued and levies made upon lands belonging to Simmons, which were sold by the sheriff to Hawley. The lands not having been redeemed, what was understood and intended to be a deed for the premises was executed and delivered to Hawley, but owing to a misdescription of the land and other imperfections it was inoperative and ineffective to pass the title. Not being aware of the defective character of his deed Hawley commenced an action of ejectment against Simmons for the possession of the land, but he was defeated and a judgment rendered in favor of the defendant Simmons. Hawley then commenced a proceeding in equity to have his deed corrected and made to conform to the intention of the parties. The defendant set up the recovery of the former judgment as a defense. On the trial the plaintiff was again defeated and his bill dismissed. Having taken the case to the Supreme Court it was held that the plaintiff might have the mistake in his deed corrected and would then be in a condition to bring another action of ejectment against Simmons, or whoever happened to be in possession of the premises, and the former adjudications would be no bar to a recovery, for the title which he would then put in issue would be a new or subsequently acquired title which was not at all involved or passed upon in the former trial and hence could not be affected by that adjudication. *Hawley v. Simmons*, 102 Ill. 115 (1882); see also *Smith v. Sheldon*, 65 Ill. 219; *Barrows v. Kindred*, 4 Wall. (U. S.) 402; *Noonan v. Bradley*, 9 Wall. (U. S.) 394; *DeRevier v. Carstillon*, 4 Johns. Ch. (N. Y.) 85; *Bartlett v. Judd*, 23 Barb. (N. Y.) 262; *Foster v. Clark*, 79 Ill. 225; *Hammond's Lessee v. Inloes*, 4 Md. 138; *Smith v. Sherwood*, 4 Conn. 276; *Bradford v. Bradford*, 5 Conn. 127; *Troutman v. Vernon*, 1 Bush (Ky.), 482; *Marshall v. Shafter*, 32 Cal. 176; *State Bank v. Bridges*, 11 Rich. (N. C.) 87; *Mann v. Rogers*, 35 Cal. 316; *Foster v. Evans*, 51 Mo. 39; *Briggs v. Wells*, 12 Barb. (N. Y.) 567.

§ 24. **A Conclusion of Law.**—In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined.²

290; *Evelyn v. Hayne*, 3 East, 36, 381; *Hooper v. Hooper*, 1 McC. & Y. note; *Church v. Leavenworth*, 4 509.

Day (Conn.), 274; *Ryer v. Atwater*, 4 ¹ *Hawley v. Simons*, 102 Ill. 118 *Day (Conn.)*, 431; 2 *Garrison*, 220; (1882).

Whittemore v. Whittemore, 2 N. H. ² *Magruder, J.*, in *Riverside Co. v. Townshend*, 120 Ill. 9 (1886); *Cromwell v. County of Sac*, 94 U. S. 351. 26; *Manny v. Harris*, 2 Johns. (N. Y.) 24; *Vooght v. Winch*, 2 Barn. & Ald. 662; *Stafford v. Clark*, 2 Bing.

§ 25. A Recovery Against the Occupant Binds All Parties Holding Under Him, etc.—By statutory provisions in many of the States ejectment can only be brought against the person in possession of the premises if they are occupied, or against a person claiming title, etc., when out of possession and the premises are vacant and unoccupied. When occupied, persons not in possession can not be made defendants to the action. When a recovery is had against the occupant, the judgment binds not only him, but all persons under whom he occupies, together with all persons in privity of estate or possession with himself. When a recovery is had against a tenant the landlord is bound by it. So a recovery against a tenant in common who holds for himself and under the other tenants in common, is binding upon all the co-tenants as well as himself. There is, therefore, no necessity for making any other than the occupant a defendant to bind all persons in privity, by a recovery. And if there is no privity between those in and those out of possession, joining them would involve the necessity of trying two or more separate, distinct titles and causes of action in one suit.¹

§ 26. A Judgment in Trespass is Not a Judgment in Bar.—In trespass to real estate where the general issue is alone pleaded the title to premises is not put in issue; under this plea the defendant can only contest the fact of the trespass complained of. The narrow issue thus made excludes any assertion or trial of ownership of the premises, and for the purposes of the trial the title is conceded to be in the plaintiff.² And yet it seems that where the title is put in issue and tried in the action of trespass the judgment can not under any circumstances be a bar to a subsequent suit in ejectment between the same parties for the same premises. If the contrary doctrine was supported by the common law it would not be in harmony with statutes of the States in relation to the actions of trespass and ejectment. A party is entitled to but one trial as a matter of right in an action of trespass, while under the statutes of nearly all of the States, upon complying with certain conditions,

¹ Walker, J., in *Hanson v. Arm-land*, 59 Mich. 455; 26 N. W. Rep. strong, 22 Ill. 445 (1859). 865 (1886); *Jacobson v. Miller*, 41 Mich.

² *Peoria, etc., Ins. Co. v. Perkins*, 90, 98, 99; 1 N. W. Rep. 1013. 16 Mich. 380, 384; *Keyser v. Suther-*

generally the payment of the costs of the first trial, he has an absolute right to another trial of which no court can lawfully debar him. A single judgment in ejectment is not necessarily final for any purpose. A judgment in trespass, on the contrary, is final, unless set aside by the trial court or reversed by some higher tribunal. If a judgment in trespass were permitted to be a bar to a subsequent action of ejectment by the same parties, involving the title to the same premises, the statutory right of new trials in ejectment could easily be annulled. The plaintiff, being at liberty to choose his form of action, could bring trespass and settle his title in one action.¹ At common law a judgment in trespass *quare clausum fregit* was never a bar to an action of ejectment.

In New York a different doctrine seems to prevail under the decisions in that State holding that "judgment in trespass in *quare clausum fregit* is a bar to an action of ejectment. It seems to be quite common for a party claiming the title to land and the right of possession, and who desires to avoid the delays consequent upon the statutory right to new trials, in an action of ejectment, to bring his action in trespass and so establish his right to the title and possession upon a single trial." *Shumway v. Shumway*, 42 N. Y. 145. But these decisions simply render the right granted by the law-making power to grant a new trial in ejectment abortive and ineffective. The views announced in the text are believed to be in accordance with principle and consistent with the statutory provisions in relation to the action of ejectment. *Keyser v. Sutherland*, 59 Mich. 455; *Dunkle v. Wiles*, 5 Denio (N. Y.), 296.

§ 27. **A Judgment in Forcible Entry and Detainer Not in Bar of the Action.**—A judgment in an action of forcible entry and detainer can not be pleaded as a bar to an action of ejectment, for the reason that the questions involved in the two proceedings are different. The object of the action of ejectment is to try the title to property, while in an action of forcible entry and detainer "the immediate right of possession is all that is involved and the title can not be inquired into for any purpose."²

§ 28. **The Rule in California.**—In California a judgment in ejectment has the same conclusiveness as a judgment in any

¹ *Keyser v. Sutherland*, 59 Mich. 455; 26 N. W. Rep. 865 (1886); *Morse v. Marshall*, 97 Mass. 519, 523; *Hargus v. Goodman*, 12 Ind. 629; *Sabins v. McGhee*, 36 Pa. St. 453; *Parker v. Hotchkiss*, 25 Conn. 321; *Chandler v. Walker*, 21 N. H. 286.

² *Magruder, J., in Riverside Co. v. Townshend*, 120 Ill. 9 (1886); *Kepley v. Luke*, 106 Ill. 395; *McGuirk v. Burry*, 93 Ill. 118; *Smith v. Hoag*, 45 Ill. 250; *McCartney v. McMullen*, 38 Ill. 237; *Shoudy v. School Directors*, 32 Ill. 290.

common law action, and in determining its effect the same principles are applied which control the result of the like inquiry in other cases. A defeated plaintiff may bring a new action upon the after-acquired title with the same effect as a stranger in whom such title might have been vested, and the former judgment will no more bar one than the other.¹

§ 29. **A Disclaimer.**—The term disclaimer, in law, signifies the act of abandoning or renouncing something. In real actions a disclaimer of the tenancy or title is frequently added to the plea of non-tenure. If the action be one in which the demandant can not recover damages, as formedon in the descender, the demandant or plaintiff was bound to pray judgment, etc., and enter, for thereby he has the effect of his suit; *et frustra fit per plura quod fieri potest per pauciora*. But if the demandant can recover damages and is unwilling to waive them, he should answer the disclaimer by averring that the defendant is tenant of the land, or claims to be such, as the writ supposes, and proceed to try the question, otherwise he would lose his damages. The same course may be pursued in the action of ejectment, although in Pennsylvania the formality of such a replication to the disclaimer is dispensed with, and the fact is tried without it. Yet, if the plaintiff is willing to waive his claim for damages there is no reason why he may not ask for judgment upon the disclaimer without trial, for thereby he has the effect of his suit *et frustra fit per plura, etc.*²

Under the Indiana statute, a disclaimer does not bar an action for the wrongful withholding of possession, nor defeat the right to damages therefor.

A disclaimer being a confession of the cause of action, and operating to preclude plaintiff from prosecuting his case beyond a judgment for possession and damages, is not demurrable. *McAdams v. Lotton*, 118 Ind. 1; 20 N. E. Rep. 523 (1889).

The defendant, having disclaimed, can not defend by showing that he is in possession, as agent of a stranger; but he may show that he is in as agent of his wife, provided the evidence of her separate title is sufficiently clear to rebut the presumption that her possession is in his right. *Duncan v. Sherman*, 121 Pa. St. 520; 15 Atl. Rep. 565 (1888).

§ 30. **The Disclaimer in Ejectment.**—It has been held in some of the States that a disclaimer is not a proper plea in an action of ejectment and there seems to be a very reasonable

¹ *Merryman v. Bourne*, 76 U. S. (9 Wall.) 592 (1869). ² *Bouv. Law Dic.*, 426.

ground for his doctrine.¹ At common law a disclaimer in an action of ejectment was held proper by some of the courts, and it was also held to be a plea in confession and precluded the future prosecution of the case at the cost of the defendant.² But it is not so easy to perceive how this can be entirely correct, even where the common law prevails; for, if the defendant is unlawfully in possession his disclaimer can not be justly held to deprive the plaintiff of a right to a judgment for possession. If a disclaimer can have this effect, then a defendant can keep the plaintiff out of possession until after the action is brought, defeat his action by a disclaimer, and compel him to pay the costs of vindicating a clear legal right.³

No principle of equity or justice sustains such a doctrine.* If a plaintiff has a right to relief when he brings his action, he has a right to a judgment awarding him that relief. If it is his right to have relief, he can not be made to pay the costs of securing it. But however it may be at common law, under the statutes of most of the States, a plaintiff is entitled to judgment for possession and for actual damages as mesne profits or otherwise, while at the common law he is only entitled to nominal damages.⁴ If a person has been kept out of the possession of his property, and another has reaped the benefit from it, there can be no necessity for two actions where the whole matter can be properly adjusted in one. Where the statute gives the plaintiff a right to damages the defendant can not defeat that right by filing a disclaimer. It does not bar the action nor defeat the right to damages.⁵

§ 31. **Legal Effect of the Disclaimer.**—A disclaimer is essentially a confession of the cause of action and operates to preclude the plaintiff from prosecuting his case beyond a judgment awarding him possession and damages. Its office is not to bar the action, but to save costs which accrue after the entry of a proper judgment embodying the relief the law awards

¹ Noe v. Card, 44 Calif. 576, 609.

⁴ Doblens v. Baker, 80 Ind. 57; Hays

² Greely v. Thomas, 56 Pa. St. 35

v. Willstach, 82 Ind. 13; McAdams v.

Killen v. Compton, 60 Ga. 116; Mc-

Adams v. Lotton, 118 Ind. 1; 20 N. E. Rep. 523

Adams v. Lotton, 118 Ind. 1; 20 N. E.

(1889).

Rep. 523.

⁵ Boyd's Lessee v. Cowan, 4 Dall. (U.

³ McAdams v. Lotton, 118 Ind. 1; 20
N. E. Rep. 523.

S.) 138; McAdams v. Lotton, 118 Ind.
1 (1889).

the plaintiff. If, however, the defendant should, in defiance of such judgment and in opposition to his disclaimer, refuse to yield, and compel the plaintiff to take out a writ of ouster, he would undoubtedly burden himself with all the costs.¹

A specification of non-tenure and disclaimer, pleaded with the general issue, to a writ of entry, is falsified by proof of occupation of the demanded premises by the tenant with a permanent building, although such occupation is by a mistake of boundary and without intention to dis seize. *Proprietors, etc. v. Nashua, etc.*, R. R. Co., 104 Mass. 1870.

§ 32. **A Homestead Right Defined.**—In law the term homestead means the family residence exempt from forced sale for debt, and as such the term is used in this work.² The right or estate of homestead as a defense to actions for the recovery of the possession of the lands in which it exists depends much upon the construction of the statutes upon which the estate depends.

§ 33. **The Right of Homestead as a Defense.**—Where the language of a deed comprehends every claim, interest and estate of whatever description, at law or in equity, in express terms, it would seem to pass the homestead right. As a general principle this may, perhaps, be true, and is in accordance with the views of eminent law writers. But courts are bound, in all such cases, no matter what may be the general language of the deed, wherever the claim of a homestead is set up, to examine and see if that right has been released or waived in the mode prescribed by the particular statute applicable to such cases. It is universally held that there must be a special release or waiver of the right in writing and acknowledged in the manner prescribed by law.³

§ 34. **The Right May Be Lost by Abandonment or Waiver.**—An abandonment of the premises by the person claiming the right of homestead, or a surrender of the possession of the same to a purchaser seem to be as effectual as a formal release or waiver. Such a party could not turn around, after putting his grantee in possession and actually abandoning the premises, and put him out of possession by an action of ejectment.⁴

¹ *McAdams v. Lotton*, 118 Ind. 1; *People*, 18 Ill. 194; *Ackley v. Chamberlain*, 16 Cal. 181.
20 N. E. Rep. 523 (1889).

² For similar definitions see 9 Am. & Eng. Ency. 424; *Tumlinson v. Swinney*, 22 Ark. 400; *Philles v. Smolley*, 23 Tex. 394; *Watters v. Breese, J., in Redfern v. Redfern*, 38 Ill. 509 (1865).

§ 35. **Let the Purchaser Beware.**—Parties contracting for the purchase of property protected by homestead laws are presumed to have knowledge of the law; and if there be no special release of the homestead estate in the manner prescribed by the law, the inference must be, although by the language of the deed all rights, claims and interest are conveyed, that the homestead was intentionally reserved by the grantor.¹

§ 36. **Equitable Estoppels as Defenses—The Term Defined.**—An equitable estoppel, or as it is frequently called, estoppel by matters *in pais*, is the preclusion of a person from asserting a fact by some previous conduct as regards matter of fact, inconsistent therewith on his own part, or on the part of those under whom he claims. Bigelow defines it to be a right arising from acts, admissions, or conduct which may have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.²

§ 37. **Requisites of the Equitable Estoppel.**—(1) A false representation or a concealment of material facts, and silence, when it is the duty to speak, is equivalent to concealment.³

(2) The representation or concealment must be made with knowledge of the facts, unless the party was bound to know, them or his ignorance was the result of his negligence.⁴

(3) Ignorance of the facts in the party relying upon the estoppel.⁵

(4) The representations or the concealment must have been made with the intention that it was to be acted upon, or with negligence amounting to a breach of duty.⁶

(5) The party relying upon the estoppel must have been

¹ Breese, J., in *Redfern v. Redfern*, 518; *Griffith v. Wright*, 6 Colo. 248; 38 Ill. 509 (1865). ⁷ Am. & Eng. Ency. of Law, 16.

² Bigelow on Estoppel, 4th Ed., 445.

³ *Pittsburgh v. Danforth*, 56 N. H. 277; *Kingman v. Graham*, 51 Wis. 272; *Parliman v. Young*, 2 Dak. 175; 232; *Powell v. Rogers*, 105 Ill. 318; *Blum v. Merchant*, 58 Tex. 400; *Martin v. Angel*, 7 Barb. (N. Y.) 410; *Robbins v. Potter*, 98 Mass. 532; 7 Copper Min. Co. v. Ormsby, 47 Vt. 709. ⁵ Am. & Eng. Ency. of Law, 16.

⁴ *Stone v. Great W. Oil Co.*, 41 Ill. 85; *Leather Mfg. Bk. v. Morgan*, 117 U. S. 96; *Raley v. Williams*, 73 Mo. 310; *Bullis v. Noble*, 36 Iowa, 518; *Griffith v. Wright*, 6 Colo. 248; *Williams v. Wodworth*, 51 Conn. 277; *Kingman v. Graham*, 51 Wis. 272; *Powell v. Rogers*, 105 Ill. 318; *Shillock v. Gilbert*, 23 Minn. 373; *Robbins v. Potter*, 98 Mass. 532; *Muller v. Powdir*, 55 N. Y. 325; *Durant v. Pratt*, 55 Vt. 270.

induced to act upon the representation or concealment in a manner which, were it not for the estoppel, would result in substantial prejudice to him.¹

§ 38. **An Application of the Doctrine.**—If a person knowingly, although he does it passively by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, he shall not afterward be permitted to exercise his legal right against such person. In an action of ejectment these facts constitute an equitable estoppel or an estoppel *in pais* and are sufficient as a defense.²

§ 39. **Silence as an Estoppel in Pais.**—Cases in the Supreme Court of Pennsylvania when cited by the Supreme Court of the United States as sustaining the rule, hold that when the plaintiff's title appears of record in the proper office, mere silence on his part, when another makes claim of title to the same with a view to have a third person act upon such a claim of title, will not estop the plaintiff from asserting his title against the person acting upon such claim of title to his prejudice. The party who has placed his written title upon record has given the notice which every person is bound to know and respect. The law does not require him to go further. But if he speaks or acts it must be consistent with his recorded title. The law distinguishes between silence and encouragement. While silence may be innocent and lawful, to encourage and mislead another into expenditure on a bad or doubtful title would be a positive fraud that should bar and estop the party—the author of that encouragement and deception—from disturbing the title of the person whom he misled, by any claim of title in himself.³

The rule in Indiana.

A land owner who takes no steps to prevent the location or construction of a railroad upon his land, although he is fully apprised of its construction, can not maintain ejectment against the company, after the road has been fully completed and put into operation. His remedy is confined to the recovery of such compensation and damages as he may be entitled to. *Louisville, N. A. & C. R. Co. v. Soltwedde (Ind.)*, 19 N. E. Rep. 111 (1888).

¹ *Sulphine v. Dunbor*, 55 Miss. 255; *Burke v. Adams*, 80 Mo. 504; *Canning v. Brocon*, 50 Mich. 346; 7 Am. & Eng. Ency. of Law, 17.

² *Kirk v. Hamilton*, 102 U. S. (12 Otto) 68 (1879).

³ *Brant v. Virginia C. & I. Co.*, 93 U. S. 326; *Knauff v. Thompson*, 16 Pa. St. 357, 364; *Crest v. Jack*, 3 Watts (Pa.), 240; *Hepburn v. McDowell*, 17 S. & R. (Pa.) 383; *Kingman v. Graham*, 51 Wis. 232.

*The rule in Pennsylvania.*¹

A plaintiff in ejectment against a railroad company which has taken his land without compensation or condemnation proceedings, will not be denied judgment because he has knowingly permitted the company to put improvements upon the land; but a stay of execution may be had, giving the company an opportunity to condemn the land. *Allegheny Valley R. Co. v. Colwell* (Pa.), 15 Atl. Rep. 927 (1898).

§ 40. Estoppel in Pais in Actions for the Recovery of Real Property.—In this class of cases the doctrine of estoppel *in pais* proceeds upon the ground of constructive fraud or gross negligence, which in effect implies fraud, and, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet the courts will not grant relief. It has been laid down by a very learned judge that the cases on this subject go to this extent only—that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud, and it would seem that the enforcement of an estoppel of this character, with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established.¹ It is essential also for the application of the doctrine of estoppels *in pais*, with respect to the title of real property, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient or available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.²

§ 41. An Equitable Estoppel a Sufficient Defense.—A serious question arising on this branch of the law is, whether, consistently with the authorities, the defense of the equitable estoppel is available as a defense in actions of ejectment.

¹ *Kingman v. Graham*, 51 Wis. 232; ² *Brant v. Virginia, C. & S. Co.*, 93 8 N. W. Rep. 413 (1881); *Brant v. Vir-* U. S. 326; *Kingman v. Graham*, 51 *ginia, C. & I. Co.*, 93 U. S. 326; *Nor-* Wis. 232. *ton v. Kearney*, 10 Wis. 610; *Vilas v. Mason*, 25 Wis. 310; *McLean v. Dow*, 42 Wis. 610.

There are cases, however, that come within the reasons upon which rest the established exceptions to the general rule, that title to land can not be extinguished or transferred by acts *in pais* or by oral declarations. "What I induce my neighbor to regard as true is the truth, as between us, if he has been misled by my asseveration," became a settled rule of property at a very early period in courts of equity.¹ Chancellor Kent stated the principle thus: "There is no principle better established nor one founded on more solid considerations of equity and public utility, than that which declares that a man who, knowingly, though he does it passively, looks on and suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, shall not be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by his equitable estoppel."² While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law.

Mr. Justice Lawrence said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land."³

In Smith's Leading Cases, 7th American edition, with notes by Hare and Wallace, the authorities are carefully examined, and it is said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law.⁴ It is there said: The question presented in these and other cases which involve the operation of equitable estoppels on real estate, is both difficult and important. It is undoubtedly true that the title to land can not be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the statute of frauds which require a writing when the realty is involved. But it is equally well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible to do so without violating the general

¹ Kirk v. Hamilton, 102 U. S. (12 Otto) 68 (1879). ³ King v. Butterton, 6 T. R. 554.

⁴ 2 Smith L. Cas. pp. 734-740, 7th

² Wendell v. Van Rensselaer, 1 Am. Ed. Johns. Ch. (N. Y.) 344.

policy of the act and giving rise to the uncertainty which it was meant to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser, under circumstances where the omission operates as a fraud; and although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity. It would, therefore, seem too late to contend that the title to real estate can not be passed by matter *in pais* without disregarding the statute of frauds, and the only room for dispute is as to the forum in which relief must be sought.

The remedy in such cases lay originally in an application to chancery, and no redress could be had in a merely legal tribunal, except under rare and exceptionable circumstances. But the common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagors and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from courts of equity, and as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law.

Protection against fraud is equally necessary, whatever may be the nature of the interest at stake, and there is nothing in the nature of real estate to exclude those wise and salutary principles which are now adopted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions.”¹

§ 42. **The General Rule.**—The authorities are quite harmonious on the subject of estoppel *in pais*. When a party,

¹ *Kirk v. Hamilton*, 102 U. S. (12 Otto) 68 (1879); 2 *Smith L. Cas.* 734, 7th Am. Ed., Hare & Wallace' notes.

either by his declarations or conduct has induced a third person to act in a particular manner, he will not afterward be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person, or to some one claiming under him.¹ When so applied, it is as effectual as a deed would be from the party estopped. The general rule deduced from all the authorities is that if one is induced to purchase land by the acts or representations of another, designed to influence his conduct, and creating a reasonable belief on his part, under which he acts, that he is thereby acquiring a valid title to the same, the party who has thus influenced him is estopped from setting up his own title existing at the time of the purchase against that of the purchaser.²

Where defendants in ejectment were in possession of lands as heirs of one who had purchased of plaintiff, paid part of the purchase money, and taken possession, they are estopped to deny plaintiff's original title; and, to prevent recovery, they must show either a conveyance of some kind by plaintiff, or adverse possession as against him sufficient to bar a recovery. *Ware v. Dewberry*, 84 Ala. 568; 4 So. Rep. 404.

§ 43. The Defendant in Execution Can Not Dispute the Title of the Purchaser, etc.—It is the general rule, where a defendant in execution, when land has been sold thereunder, is sued in ejectment by the purchaser under the execution, to recover the possession, he can not dispute the plaintiff's title.³ The doctrine of all the cases on this point is that the purchaser comes into exactly such estate as the debtor had, and if it was a tenancy the tenant will be a tenant also, and estopped in a suit by the landlord from disputing his right in the same manner as the original tenant who be-

¹ Trustees, etc., v. Smith (N. Y.), 23 N. E. Rep. 1003 (1890).

² Wendell v. Van Rensselaer, 1 Johns. Ch. 344, 354; Storrs v. Barker, 6 Johns. Ch. 166; Town v. Needham, 8 Paige, 545; Dezell v. Odell, 3 Hill. 215. Also, see dissenting opinion of Judge Bronson, approved in *Finnegan v. Carragher*, 47 N. Y. 500; *Brown v. Sprague*, 5 Denio, 545; *Plumb v. Insurance Co.*, 18 N. Y. 393; *Canal Co. v. Hathaway*, 8 Wend. 483; *Thompson v. Blanchard*, 4 N. Y. 303; Con-

tinental Nat. Bank v. National Bank, 50 N. Y. 575; *Armour v. Railroad Co.*, 65 N. Y. 111-122; *Rubber Co. v. Rothery*, 107 N. Y. 310-316; 14 N. E. Rep. 269. Numerous cases where this principle has been applied to real estate are collected in Washburn on Real Property (volume 2, c. 3, § 6).

³ *Hayes v. Barnard*, 38 Ill. 297 (1865); *Ferguson v. Miles*, 3 Gil. (Ill.) 358; *Cheney v. Denn*, 8 Blackf. (Ind.) 552; *Jackson v. Graham*, 3 Cai. R. (N. Y.) 188.

comes a quasi tenant at the will of the purchaser.¹ If, however, after the sale the defendant in execution abandon the premises and afterward return to it, and is then sued in ejectment, he may show an outstanding title, provided he can show that he has taken possession and holds under it. This, it is necessary he should do. Suppose the title he had when the land was sold under the execution was defective; that it was never in him, in fact, but in a stranger; what rule of law or consideration of public policy should prevent him from showing the title to be in the stranger, and that he holds under him? We know of none. This rule certainly violates no principle of law applicable to such cases. The defendant does not, by showing an outstanding title in a stranger and connecting himself with it, defeat any right the plaintiff may have acquired by the purchase. If the defendant had no right to the land at the time of the sale the plaintiff acquired none. If he afterward comes into possession under a genuine and *bona fide* title existing in a stranger, and succeeds in connecting himself with that title, it must be a complete defense to the action.²

§ 44. **The Grantor Can Not Set Up an After-acquired Title, etc.**—We understand it to be a well-settled principle of the common law that if one conveys lands, or other real estate, with a covenant of general warranty against all lawful claims and demands, he can not be allowed to set up against his grantee or those claiming under him any title he himself may subsequently acquire from another by purchase or otherwise. Such new title will inure, by way of estoppel, to the use and benefit of his grantee, his heirs or assigns. This principle is founded in equity and justice, for it is not just that a party should be permitted to hold or recover an estate, in violation of his own covenant.

And the policy is wise also, for it represses litigation. If the grantor could recover the premises on an after-acquired title, the grantee, in his turn, would be entitled to an action against the grantor to recover back the purchase money and interest. By estopping him by his deed a multiplicity of suits

¹ *Masten v. Bush*, 10 Johns. (N. Y.) 223; *Hobson v. Doe*, 4 Blackf. (Ind.) 487; *Haines v. Spencer*, 3 Ind. 494. ² *Breese, J., in Hayes v. Bernard*, 38 Ill. 300 (1865).

is prevented and equal justice done. He can never aver against his own deed that the estate he conveyed was not in fee simple.¹

Where a person binds himself by contract to sell land which he does not own, but the title to which he afterward acquires and conveys by general warranty to the person to whom he contracted to sell, he can not, in ejectment based on the title so conveyed, set up that he had no title at the time he agreed to sell. *Ryan v. United States*, 136 U. S. 98; 10 S. Ct. Rep. 913.

The Illinois statute of conveyances, after prescribing the form of a quitclaim deed, provides that every deed in substance in the form prescribed, when otherwise duly executed, shall be deemed and held to be a good and sufficient conveyance, release and quit claim to the grantee, his heirs and assigns, in fee of all the then existing legal or equitable rights of the grantor in the premises therein described, *but shall not extend to after-acquired title unless words are added expressing such intention*. R. S. Ill. 1889, p. 338, § 10.

§ 45. **After-acquired Titles by Grantor.**—The law of estoppel, to avoid circuity of action, is well established; as where a party conveys land with warranty, to which he has no title, and afterward acquires a good title by descent or purchase, and thereupon brings an action against his grantee to recover the land. In such a case the demandant has a good title to the land, and no title passed by his deed to the grantee; yet, as he would be liable on his warranty for the value of the land, if he should recover, the principle of avoiding circuity of action interposes and rebuts and bars his right.²

§ 46. **The Rule in Wisconsin and Georgia.**—If there is a positive misrepresentation, it in general suffices, if it be made either with the intention that another should act upon it, or with knowledge that he is about to act, or under such circumstances that a reasonable man would know that it would be acted upon. No one, however, is under any obligation to exercise care or diligence to prevent another's being defrauded in a transaction to which he is not a party. In this class of cases a person is estopped because he has not spoken when he ought to have spoken. The duty to speak rests upon the knowledge that another is about to act in ignorance of the

¹ Breese, J., in *Jones v. King*, 25 Ill. 276; *Somès v. Skinner*, 1 Pick. (Mass.) 338 (1861); *Bush v. Person*, Adm., 18 51.

How. (U. S.), 82 (1855); 4 Kent's Com. ² Wilde, J., in *Wade v. Lindsey*, 98; *White v. Potter*, 24 Pick. (Mass.) 47 Mass. 413 (1843).

326; *Trevioam v. Lawrence*, 1 Salk.

truth. Thus, where the title has been recorded, it may fairly be presumed that subsequent purchasers have used the means pointed out by law, and acquired all the knowledge which it is important for them to have, or that they will do so. When, however, the owner is directly apprised of the ignorance of the buyer, and of his purpose to act in such ignorance, he can not claim the benefit of this principle, because good faith then requires him to speak. This is the rule held in Wisconsin and Georgia, and is, perhaps, a qualification of the rule stated by the Supreme Court of the United States and of Pennsylvania.¹

§ 47. **The Rule in the Federal Courts.**—In the Federal courts and in the courts of those States where law and equity exist under separate jurisdictions, the equitable estoppel is not in general available as a defense in actions of ejectment. In actions where the title of real property is in issue, if a person has been induced to do an act prejudicial to himself, in consequence of the acts or declarations of another upon which he had a right to rely, the equity side of the court will, upon application, enjoin the person making such declarations or acts from asserting his legal rights against the tenor of such acts and declarations until the equitable rights of his adversary can be determined.²

In the courts of the United States an equitable defense can not be heard to defeat the legal title in an action of ejectment, nor will a homestead exemption under the State laws, taken on land to which the plaintiff has the legal title, defeat his action. *Doe v. Aiken*, 31 Fed. Rep. 393.

§ 48. **Equitable Defenses.**—In the great majority of the States equitable defenses are available in actions of ejectment. These defenses exist, in the main, where the possession of the defendant is under an equitable title, and is not wrongful in the general acceptance of the term, as we have seen. These defenses, in the Federal courts and in Illinois, are available through the interposition of the equity side of the court. A perfect equity united with the possession is equivalent for all purposes of defense to a legal estate.³

¹ *Markham v. O'Connor*, 52 Ga. 183; (1858); *Cadiz v. Majors*, 33 Calif. Kingman v. Graham, 51 Wis. 232; 288 (1867); *Crary v. Goodman*, 12 N. McLean v. Dow, 42 Wis. 610. Y. 266 (1855); *Traphagen v. Trap-*

² *Bronson v. Worth*, 84 U. S. (17 hagen, 40 Barb. (N. Y.) 537 (1833); Wall.) 32 (1872). *Rowe v. Beckett*, 30 Ind. 154 (1868);

³ *Hayden v. Stewart*, 27 Mo. 286 *Warren v. Crew*, 22 Iowa, 367 (1867).

Illustrations.

In Wisconsin an equitable defense is available as a counter-claim and not by answer. *Dupont v. Davis*, 35 Wis. 631 (1874).

Under the system of pleading in Dakota, equitable defenses may be set up in ejectment by way of counter-claim, and when so set up they assume the character of a suit in equity, and it is the proper practice for the court to determine the equitable issues first, and to discharge the jury if there remains no issue of law to try. *Suessenbach v. First Nat. Bank*, 5 Dak. 477; 41 N. W. Rep. 662 (1889).

Defendant may rely on his equitable title and possession, and need take no action to obtain his legal title, and lapse of time, therefore, does not affect his right to interpose the defense. *De Guire v. St. Joseph Lead Co.*, 38 Fed. Rep. 65.

In ejectment, defendant claimed under one M. The answer alleged a prior purchase from M. by a verbal contract under which defendant took possession, and made lasting and valuable improvements, and that within the time fixed by the contract he tendered the purchase money. *Held*, that a good defense was stated. *Chandler v. Neil* (Kan.), 26 Pac. Rep. 470; Am. Dig. 1891, 1389.

One who has taken possession of land under a parol contract of purchase from the owner can not be ejected at the suit of a grantee of the owner, where there has been no previous demand for possession, since he is the owner's tenant at will. *Jones v. Temple* (Va.), 12 S. E. Rep. 404 (1890); Am. Dig. 1891, 1383.

In an action for the recovery of land, defendant claimed under deed executed in 1879. Plaintiffs claimed as heirs at law of defendant's grantor. It appeared that defendant's grantor remained in possession of the land long after the execution of the deed; that in 1886 he leased the land to a person who afterward sublet it to defendant; that defendant never had possession until he leased the land. On special issues, the jury found, *first*, that the land was not embraced in defendant's deed; and *second* that defendant entered upon the land as the tenant of his grantor. The court set aside the first finding as against the weight of the evidence, but gave judgment for the plaintiff on the second finding. *Held*, that the court erred, for, if it appeared from the evidence that the defendant had an equitable title to the land, he could set up that title against the lessor or any claiming under him. *Allen v. Griffin*, 98 N. C. 120; 3 S. E. Rep. 837 (1887).

Plaintiff held the legal title under partition proceedings. Defendant, his brother, claimed that the title was taken by plaintiff for defendant's benefit. There was evidence that plaintiff had declared, both before and after the decree in partition, that he was taking the title for defendant, who was a man of but little intelligence. It was shown that defendant had assigned to plaintiff his interest in their father's estate, for the alleged purpose of enabling plaintiff to procure the title under the partition for defendant's benefit. Defendant's wife testified that plaintiff "came to our house and coaxed Tom [defendant] to make the assignment; that he should make it to him or else he would be cheated out of his whole interest." *Held*, that the court erred in directing a verdict for plaintiff. *Hoover v. Hoover* (Penn.) 12 Atl. Rep. 276 (1888).

Defendants, who were in possession of land under a contract to purchase,

assigned the contract as security for a debt. The assignee assigned to plaintiff, who, with full knowledge of defendants' right, made payment to the vendor of the full purchase money, surrendered the contract, and received a deed for the land. He then brought ejectment. There was no evidence that defendants were in default under the contract. *Held*, that their equitable title should prevail over plaintiff's legal title, and he can not recover. *Hyde v. Mangan*, 88 Cal. 319; 36 Pac. Rep. 180 (1891).

But it is no defense to ejectment that plaintiff and defendant's grantors entered into a partnership to acquire lands and make improvements thereon, and that he had purchased the interest of his grantors, and no settlement of the partnership affairs had been made, especially where it appears that plaintiff filed on the land in his own name, and paid for it with his own funds; that it was the understanding of the partners that each should secure and own his own land; and that the improvements made by each claimant were not to be considered a part of the partnership property. *Burgess v. Rice*, 74 Cal. 590; 16 Pac. Rep. 496 (1888).

One who as agent has sold lands, received payment, and delivered a deed from which one lot is by mistake omitted, can not, on discovery of the mistake, obtain a deed for that lot, and eject the former vendee, who, without notice of the mistake, has gone into possession and made improvements. *Meeker v. Dalton*, 75 Cal. 154; 16 Pac. Rep. 764 (1888).

In an action to recover land, of which the complainant alleges plaintiff is owner and entitled to possession, where the answer is a simple denial, evidence that plaintiff purchased the land at a trustee's sale as agent for his father, the trustee, at a price much less than its value, being a purely equitable defense, is irrelevant. *Hinton v. Pritchard*, 98 N. C. 355; 8 S. E. Rep. 887 (1889).

An answer in ejectment setting up a decree in partition, and a deed to defendant pursuant thereto, and praying for a decree that he is the owner, and entitled to possession, and for such other relief as shall be right and proper, presents no equitable defense. *Hart v. Steedman*, 98 Mo. 452; 11 S. W. Rep. 993 (1888).

The equitable defense that a deed absolute was intended and understood by defendant to be only a mortgage, and that plaintiff purchased the premises with notice of his claim, can not be made in an action of ejectment. *Gates v. Sutherland*, 76 Mich. 231; 42 N. W. Rep. 1112.

Evidence of an oral agreement between defendant and one to whom he conveyed the land, and under whom plaintiff claims, that defendant should have the right to redeem on payment of a certain sum per acre, with interest, is properly excluded, it being incompetent either to show that the conveyance was a mortgage, the action being at law, or to show an agreement to reconvey, which would be invalid under the statute of frauds. *McGinnis v. Fernandes*, 126 Ill. 228; 19 N. E. Rep. 44 (1889).

One who is in default in his payments on a contract of purchase under which he claims possession, and who has made no offer to pay what is due, can not rely on the contract as an equitable defense in ejectment by a subsequent grantee. *Connolly v. Hingley*, 82 Cal. 642; 23 Pac. Rep. 273 (1890).

A verbal promise by the owner of the land, made without consideration, to extend the time of payment for two years beyond the time fixed in the written contract, is not an equitable defense to an action of ejectment

brought seven years after the expiration of that period, during all of which time no payments have been made. *Connolly v. Hingley*, 82 Cal. 642; 23 Pac. Rep. 273.

In ejectment for non-payment of the purchase price under a contract of sale, defendant can not object that the amounts alleged to be due under the contract are barred by the statute; the theory of the complaint being, not that defendant is absolutely liable for such amounts, but that he should be adjudged to have forfeited his right to the land, unless he pay such amounts within a reasonable time fixed by the judgment. *Kerns v. Dean*, 77 Cal. 555; 19 Pac. Rep. 817 (1889).

In ejectment by one claiming under a trustee's deed, the answer set up the equitable defense that, at the time of the sale under the trust deed, the notes which it secured were fully paid, and that the sale was otherwise fraudulent; and asked that the sale be set aside if the notes should be found to be paid, or to redeem if found otherwise. *Held*, that the refusal to strike out this defense was not error. *Estes v. Fry*, 94 Mo. 266; 6 S. W. Rep. 660.

§ 49. **Equitable Defenses Discussed.**—The rights of property, however sacred, and guaranteed by legislative enactments and constitutional provisions, must be held and enjoyed in relation to the rights of others. While real property in the possession of the owner may be kept and enjoyed by him with little or no respect to the wants or wishes of others, yet, when he once suffers it to pass from his own possession and control into that of others, either with or without consideration, the law limits him in the manner of repossessing himself of it,¹ as one who is put in possession upon an agreement for the purchase of land, can not be ousted by ejectment before his lawful possession is determined by a demand of possession or otherwise.² These limitations can only be measured by the facts of each particular case.

§ 50. **Equitable Title a Legal Defense Between Vendor and Vendee.**—The action of ejectment proceeds for the possession of the premises, claiming that they have been unlawfully entered into and unjustly withheld; facts which go to disprove these, make a legal defense. We can perceive no good reason why proof of the contract, taking possession, making valuable improvements, paying the taxes, and exercising every imaginable act of ownership over the property, and paying the amount contracted to be paid for it or tendering the amount at the proper time, should not amount to a legal defense to an action of ejectment. That action proceeds for the possession

¹ *C. & N. W. R. Co. v. Redick*, 16 Neb. 313; 20 N. W. Rep. 309 (1884). ² *Right v. Beard*, 13 East, 210.

of the premises, claiming that they have been unlawfully entered into and unjustly withheld.”¹

§ 51. **Equitable Titles Vested by Oral Contract.**—The law seems to be well settled that a parol contract to sell land may be enforced in equity when the vendee has taken possession under the contract and made lasting and valuable improvements or paid the purchase money. And so, too, a promise or agreement made by a father to a child, to convey a tract of land if the child will take possession of and improve the same. When the promise or agreement is followed by the child's taking possession, the expenditure of money or labor in making lasting and valuable improvements may be regarded as resting on a valuable consideration and will be upheld and enforced in a court of equity.²

§ 52. **The Statute of Frauds.**—By the statute of frauds all contracts for the sale of any lands, tenements or hereditaments, or any interest in or concerning them, for a longer period than one year, are void unless the contract is in writing. In a court of law where legal titles are alone cognizable in actions of ejectment, such a part performance as the payment of purchase money or the making of lasting and valuable improvements does not take the case out of the operation of the statute. It is otherwise, however, in a court having equity jurisdiction; and where a sufficient part performance of such contract is claimed, a specific performance of the contract will be enforced.³

A father told his daughter and her husband that if they would move on certain land and erect a house and break and cultivate the land and pay the taxes, they could have the land. *Held*, a good equitable defense to ejectment brought against them by the father. *Ford v. Steele* (Neb.), 48 N. W. Rep. 271; Am. Dig. 1891, 1390.

Evidence of an oral agreement between defendant and one to whom he conveyed the land, and under whom plaintiff claims, that defendant should have the right to redeem on payment of a certain sum per acre, with interest, is properly excluded, it being incompetent either to show that the conveyance was a mortgage, the action being at law, or to show an agreement to reconvey, which would be invalid under the statute of frauds. *McGinnis v. Fernandes*, 126 Ill. 228; 19 N. E. Rep. 44 (1889).

¹ Breese, J., in *Stow v. Russell*, 36 Ill. 36 (1864). ² Story's Equity Jur., § 764; *Shepherd v. Bevin*, 9 Gill (Md.) 32;

³ Craig, J., in *Langston v. Bates*, King's Heirs v. Thompson, 9 Peters, 84 Ill. 524 (1877); *King's Heirs v. Thompson*, 9 Peters, 84 Ill. 524 (1877); *King's Heirs v. Thompson*, 9 Pet. (U. S.) 204 (1835); 41 Ill. 97; *Kurtz v. Hibner*, 55 Ill. Smith v. Yocum, 110 Ill. 142 (1884); 514 (1870). *Irwin v. Dyke*, 110 Ill. 302 (1885).

§ 53. **What is Necessary to Take the Case out of the Statute.**—But in order to take a case out of the statute of frauds, the authorities all agree that a contract to convey lands must be clear and certain in its terms and established by testimony of an undoubted character, which is clear, definite and unequivocal.¹ The reason for this is plain. A court of equity ought not to act upon conjectures, and one of the most important objects of the statute is to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts.²

§ 54. **The Remedy—Equitable and Legal Titles.**—In courts where law and equity exist under different jurisdictions, a person holding lands, tenements and hereditaments under a contract of the kind mentioned in the last section has the equitable title, providing the performance of the conditions is sufficient. When made a defendant in an action of ejectment, his title not being a legal title will not avail him as a defense in those jurisdictions. His recourse for relief must be in a court of equity jurisdiction, where he may have his bill for an injunction to restrain the prosecution of the ejectment suit and for a specific performance of the contract vesting the legal title in him.³

In courts where the distinction between law and equity no longer exists, the defendant is not required to resort to the equity side of the court. He may set up his defense in his answer or by way of counter-claim. It seems to be well settled that where an equitable defense is set up in an action of ejectment, such defense must contain all the essentials of a bill in chancery, and the issue thus made is to be tried by the court without a jury, as an equitable issue.⁴ The plaintiff, where his claim is under a legal title, can only recover on his legal title where it is paramount to the legal or equitable title of the defendant.⁵ Where no equitable defense is pleaded legal title must prevail.⁶

¹ Langston v. Bates, 84 Ill. 524 (1877); Charnley v. Hansbury, 1 Harr. (Penn.) 16. ⁴ Kahn v. Old Tel. Co., 2 Utah, 174. ⁵ Rowe v. Beckett, 30 Ind. 134 (1868).

² Story's Equity Jur., § 764; Owen v. Baldwin, 1 Md. Ch. Dec. 123; 76 (1883). ⁶ Goepinger v. Ringland, 62 Iowa, Wood v. Thornley, 58 Ill. 464.

³ Fleming v. Carter, 70 Ill. 286 (1873).

Although the general rule is that the legal title must prevail in a court of law, nevertheless a purchaser of land in the possession thereof by the consent of the vendor, who has paid all the purchase money or performed his part of the contract, may successfully defend his possession in an action of ejectment brought by his vendor. *C. & E. I. R. R. Co. v. Hay*, 119 Ill. 493 (1886); *Stow v. Russell*, 36 Ill. 36; *Sloan v. Petrie*, 16 Ill. 262; *Staley v. Murphy*, 47 Ill. 241; *Kilgour v. Gockley*, 83 Ill. 109.

§ 55. **Adverse Possession Under an Equitable Title.**—A person having the equitable title to lands in Illinois, under a contract to purchase, the price of which he has paid or offered to pay, may avail himself of the statute of limitations of that State, by pleading his possession of seven years in bar of an action of ejectment; although the title used to accomplish this object could not be employed by a plaintiff, who could recover only when he has the paramount legal title.¹

§ 56. **Equitable Relief Distinguished from Matters of Defense—Affirmative Relief.**—In those jurisdictions where law and equity are blended into one system, the defendant may obtain affirmative relief in an action of ejectment. So in Wisconsin it is well settled that a defendant may plead matter of relief as a counter-claim and thus raise an equitable issue to be tried by the court without the intervention of a jury, but matters pleaded merely in defense of the action will not have this effect.²

In Nebraska, if the defendant possesses an equity which negatives the plaintiff's right of possession, such equity may be shown under the plea of the general denial, as it is a mere defense to the action. But if the defendant seeks affirmative relief such as to enforce a contract which does not give him the right of possession, but which does give him a right to demand a specific performance of the contract by the plaintiff, by which the right to continue in possession of the premises depends, he must plead the facts entitling him to such relief; and his answer must contain all the facts necessary to entitle him to such relief. In other words, he may set up in his answer the facts showing him to have an equitable right to a conveyance from the plaintiff and if he prove himself to be

¹ *Dalton v. Cain*, 81 U. S. (14 Wall.) 513, 34 Wis. 486; *Dupont v. Dores*, 472 (1871). 35 Wis. 631; *Lowe v. Hyde*, 39 Wis.

² *Dobbs v. Kellogg*, 53 Wis. 448; 10 345; *Stowell v. Eldred*, 39 Wis. 360; *N. W. Rep.* 623; *Lambard v. Cald-* *Fuchs v. Treat*, 41 Wis. 406.

the owner in equity and entitled to the possession, he will not only defeat the action but obtain the affirmative relief.¹ But in all cases where affirmative relief is sought by the defendant in actions of ejectment under those jurisdictions where law and equity are blended into one system, he must set up in his answer the facts entitling him thereto.²

§ 57. **The Remedy Where Law and Equity Exist Under Distinct Systems.**—In Illinois and some other States where law and equity are administered under separate systems the maxim, "Legal titles must prevail in actions of ejectment," is very forcibly illustrated. If the defendant challenges the legal title of the plaintiff his challenge can not be adjudicated in a court of law. The aid of a court of chancery must be invoked. If the plaintiff's title, though in form an absolute conveyance, was in fact executed as a mortgage, proof that it was executed to secure a debt is not competent in a court of law. The defendant must resort to a court of chancery, but this does not mean that he must go into another court for his remedy, for courts in these States exercise jurisdiction both in law and in chancery. The remedy of the defendant being in equity he may present his bill or petition to the court, setting up his defense, and have the further prosecution of the ejectment suit enjoined until he can show his defense, which, if sufficient, the injunction will be made perpetual. In these States the courts have two sides, one for law matters and one for chancery. The same court in which the action of ejectment is pending has ample power to protect the defendant. He has only to invoke its aid on the chancery side.³

¹ Dale v. Hunneman, 12 Neb. 221; 63. The common law rule excluding all defenses in ejectment which are not legal has been abrogated in many

² Dale v. Hunneman, 12 Neb. 221; 10 N. W. Rep. 711 (1881); Bliss' Code Pleadings, § 349; Dewey v. Hoag, 15 Barb. (N. Y.) 359; Dupont v. Davis, 35 Wis. 631; Estoda v. Murphy, 19 Calif. 248; Blum v. Robertson, 24 Calif. 128; Bruck v. Tucker, 42 Calif. 346. not legal has been abrogated in many parts of the Union. The United States courts, however, still adhere to it. Fenn v. Hohn, 21 How. 581; Hooper v. Shreimer, 23 How. 235; Johnson v. Jones, 7 Black, 209; Foster v. Mora, 98 U. S. 425. It remains in force in Illinois and Michigan.

³ Finlon v. Clark, 118 Ill. 32 (1886); Johnson v. Watson, 87 Ill. 535; Adham v. Pfleger, 84 Ill. 102; Harrett v. Childs, 44 Mich. 457; 7 N. W. Rep. Clark, 118 Ill. 32. Whitney v. Butler, 29 Mich. 123; Ryder v. Flanders, 30 Mich. 336; Buell v. Irvin, 24 Mich. 145; Finlon v.

§ 58. **Defense of the Statute of Limitations.**—The defense under the bar of the statute of limitations raises in general the question of adverse possession. This subject is fully discussed in a separate chapter, to which the reader is referred.

By the term limitations, as used in this work, is meant the time prescribed by law during which a title may be acquired to real property by adverse possession, or the period at the expiration of which no action can be maintained to recover the property. In the former case the statute may be regarded as a statute of presumptions, inasmuch as the law presumes a grant. In the latter case it is regarded as a statute of repose, under which persons who fail to assert their rights within the given period are not permitted to do so after it has expired.

Where adverse possession is set up as a defense, it is not error to instruct the jury that it is for them to determine from the evidence "whether the possession in the case was such, and was so held, as to gain title by adverse possession;" the charge, as a whole, being free from error, and what is stated immediately before and after the objectionable sentence defining what constitutes such possession. *Logan v. Friedline* (Pa.), 14 Atl. Rep. 343; Am. Dig. 1888, 14, 36.

Where defendant in ejectment relies only on adverse possession, it may be shown that the continuity of his possession was broken by dispossession under the judgment of a court of competent jurisdiction, in an action of unlawful detainer. *Bishop v. Truitt*, 85 Ala. 376; 5 So. Rep. 154 (1889).

In 1840, H. sold to W. the equitable title to certain land. H. did not obtain legal title until 1873, and in 1887 he conveyed the land to plaintiff for a nominal sum by warranty deed, taking back a contract that he should not be bound by his warranty. Prior to that time he had made no claim to the land. In 1867, W. devised the land to parties under whom defendant claims, and by them the taxes were paid. No one was in actual possession. *Held*, that defendant was not estopped by *laches* from asserting his equitable title, as his right to equitable relief depended, not on the date of his claim, but on the lapse of time after it was disputed. *Robertson v. DuBose*, 76 Tex. 1; 13 S. W. Rep. 300.

Where the defense was adverse possession for more than twenty years, defendant testified that she was put in possession by the former owner, who told her to go there and live, and take care of the property, and not go away and leave it, as another person had done; that she went to live on the land in 1851, and had paid taxes thereon since 1870; that the owner helped her build the house on the premises; that she had never paid any rent; and that the line of inclosures had never been changed. *Held*, error not to grant plaintiffs' prayer to instruct the jury that defendant had given no proof of color of title legally sufficient to prove title in her by adverse possession. *Walsh v. McIntire*, 68 Md. 402; 13 Atl. Rep. 348.

§ 59. **The Presumption of Grants as a Defense.**—In cases where the possession of lands in controversy by the defendant,

the possession of his ancestors or grantors, has been quiet and uninterrupted for a long period of time, generally the period fixed by statutes of limitation, to bar an entry, a grant will in general be presumed in favor of the defendant. Grants will be presumed from long possession which can not otherwise be explained.¹

§ 60. **A Grant Presumed to Exist, When.**—Présumptions are often indulged for the sake of quieting possession. A presumption has been defined to be an inference as to the existence of a fact not known, arising from its connection with facts which are known. It is founded upon a knowledge of human nature, and the motives which are known to influence human conduct; particularly, the disposition of man to enjoy what belongs to him. Courts, sometimes, when the circumstances of the case warrant it, will indulge in a presumption to sustain a grant of lands where none can be shown to exist.²

An Illustration.

Mr. Constantine was a Canadian refugee. He was granted a patent to eighty acres of land in the refugee tract in Clinton county, New York. It seemed sure that he did not consider it of much value, for he never occupied it, and shortly after the close of the revolutionary war he settled at St. Antoine in Lower Canada, and went into the service of the Northwest Company, where he remained twenty years. He then returned to his family at St. Antoine, which was about sixty miles from the premises in question. Eighteen years after his leaving the employ of the Northwest Company he commenced an action of ejectment against one Warford, who, with his grantor, one Rouse, had been in possession of the premises for thirty-five years, claiming to be the owners, etc. Warford entered under one Rouse and it was claimed by him that as the patent to Constantine was found among Rouse's papers, he being then dead, the adverse possession barring the plaintiff's right to recover was sufficient to warrant the jury in presuming a grant to Rouse from Constantine. But the trial judge held otherwise. For this a new trial was granted by the Supreme Court. In delivering the opinion of the court, Savage, Ch. J., said that Constantine when at home at St. Antoine resided within sixty miles of the premises and knew that Rouse was in possession; is it probable that he would have permitted Rouse to have enjoyed his property unmolested while he was obliged to resort to the wilderness for a living, leaving his wife with her friends? When to these circumstances is added the fact that after Rouse's death the patent

¹ *Marchioness of Annondale v. Habitants, etc., v. Inhabitants, etc.,* 2 P. Williams, 432; *Shelley v. Binn.* 231; *Kite's Heirs v. Schraeder*, Salk. 285; *Fairtitle v. Gilbert*, 2 T. R. 3 Litt. (Ky.) 447. 171; *Mayor of Carlyle v. Blaimire*, 8 East, 487; *Terrett v. Taylor*, 9 Cranch, 43; *Bean v. Parker*, 17 Mass. 591; In-

² *Jackson v. Warford*, 7 Wend. (N. Y.) 62.

was found among his papers, it seems that there were facts and circumstances which would have justified a verdict in favor of the defendant and the presumption of a conveyance. *Jackson v. Warford*, 7 Wend. (N. Y.) 62.

§ 61. **Right of the Defendant to Show Circumstances from Which a Grant May Be Presumed.**—A defendant in ejectment, a mere naked possessor though he may be, is entitled to have the facts and circumstances submitted to a jury, from which a presumption may arise of a conveyance of the estate claimed by the plaintiff, so that if, in the judgment of the jury, such facts and circumstances are sufficient to warrant the inference of a conveyance, they may so find, and by thus showing the title out of the plaintiff, the defendant may protect his possession, although he may be unable to trace such title to himself.¹

§ 62. **The Presumption Does Not Arise from Mere Neglect of the Owner, etc.**—The presumption in favor of a grant and against the written evidence of title can never arise from the mere neglect of the owner to assert his right, and where there has been no adverse title or enjoyment by those in whose favor the grant is to be presumed.²

§ 63. **The General Rule of Presumptions.**—Deeds, patents, and even acts of Parliament may be presumed to support the long and uninterrupted possession of a right, or claim of right, but a conveyance will never be presumed to defeat the claim of a person showing a good paper title, unless there has been an adverse possession or enjoyment under claim of right, in accordance with the fact presumed.³ Lord Ellenborough said: "Presumptions of this sort when fit to be made are always made in favor of the possession of those who are rightfully entitled to it."⁴ The question and its application in the United States will be further discussed in the chapter upon adverse possession.

§ 64. **Dedication as a Defense.**—When lands have been dedicated to any public use, such dedication is a complete defense to an action brought for the recovery of their possession. The question of dedication has recently become one of much im-

¹ *Schauber v. Jackson*, 2^d Wend. (N. Y.) 35. ³ *Doe v. Butler*, 3 Wend. (N. Y.) 149.

² *Schauber v. Jackson*, 2 Wend. (N. Y.) 35; *Doe v. Butler*, 3 Wend. (N. Y.) 149. ⁴ *Keane v. Deardon*, 8 East, 263.

portance in the United States; a discussion of a doctrine as a defense in actions of ejectment, will therefore be in line of the general scope of this chapter.

§ 65. **Title by Dedication.**—A dedication of property to public use may be expressed or implied.

(1) An express dedication of property to public use is made by a direct appropriation of it to such use and it will be enforced by the courts.

(2) An implied dedication of property to public use is one which arises from the acts of the owner, as a permission to the public for the space of eight or even six years, to use a street without bar or impediment.¹ No certain period of time is requisite to establish a dedication. It does not depend upon the lapse of time, but on the intent of the parties; and this it seems, may be established by acts, unequivocal in their character, on the part of the owner and the public, though occurring on a single day.²

A dedication to a public use, as a highway, need not be in writing; it may be proved by the acts and declarations of the parties, and the circumstances of the case, and when accepted it is irrevocable. *Cook v. Harris*, 61 N. Y. 448; *Grinnell v. Kirtland*, 68 N. Y. 629.

From what circumstances a dedication to public use may be inferred. *Ex parte Ingraham*, 4 Hun (N. Y.), 495; *Hiner v. Jeauptert*, 65 Ill. 428; *Field v. Carr*, 59 Ill. 198.

Merely permitting land to lie open, unfenced and without claim to private exclusive possession, does not evince an intent to throw it open for public use. *Strong v. Brooklyn*, 68 N. Y. 1.

Land may be dedicated by a long use as a *graveyard*. *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.), 407.

As site for a church. *Still v. Trustees of Lansingburgh*, 16 Barb. (N. Y.) 107.

As a village green. *Cady v. Conger*, 19 N. Y. 256; *Mayor v. Stuyvesant*, 17 N. Y. 34.

As a terrace and bank, in a village, between it and the adjacent waters. *Ward v. Davis*, 3 Sandf. (N. Y.) 502.

As a school house. *Potter v. Chapin*, 6 Paige (N. Y.), 639; 7 Vern. 241.

¹ *Bouvier's Law Dictionary*, 386. *Ithaca*, 15 Hun, 568; *North Thirteenth Street*, 73 N. Y. 179; *Heard v.*

² *Hunter v. Trustees*, 6 Hill (N. Y.), 407; *Irwin v. Dixon*, 9 How. (U. S.) 10; *Ward v. Davis*, 3 Sandf. (N. Y.) 502. *Dedication, what facts constitute:* *Eleventh Ave.*, 19 How. Pr. 108; *Grinnell v. Kirkland*, 68 N. Y. 629; *Niagara Bridge Co. v. Field v. Carr*, 59 Ill. 198; *Hiner v. Bachman*, 66 N. Y. 261; reversing *S. Jeaufert*, 65 Ill. 428. *C.*, 4 Lans. (N. Y.) 523; *Dewitt v.*

For public squares. Trustees of Watertown v. Cowen, 4 Paige (N. Y.), 510; Stuyvesant v. Mayor, 11 Paige (N. Y.), 414.

For streets. Denning v. Roome, 6 Wend. (N. Y.) 651; Wayman v. Mayor of New York, 11 Wend. (N. Y.) 466; Willoughby v. Jenks, 20 Wend. (N. Y.) 96.

Distinction between dedication, as applied to the conveyance of city lots and county lots. Badeau v. Mead, 14 Barb. (N. Y.) 328; but see Hammond v. McLachlan, 1 Sandf. (N. Y.) 323.

Dedication may be made by a State, by laying its lands out into streets and lots, and selling the lots to individuals, in pursuance of a statute. City of Oswego v. Oswego Canal Co., 2 Seld. (6 N. Y.) 257.

The act of several proprietors in laying out a basin connected with a canal and wharf, for the common use of themselves and purchasers of lots, is, as to the purchasers and the land purchased, a dedication of the wharf, etc., to that use; and to establish such dedication it is not necessary that there should be any length of use. It operates as an estoppel. Child v. Chappell, 5 Seld. (9 N. Y.) 246; 6 Hill (N. Y.), 413.

If in a town plat, one block appears unsubdivided and without number or mark, a statement by the owner, at the time, that it was intended to be a public square, is a dedication for that purpose. Ruch v. City of Rock Island, 5 Biss. 95. But it is otherwise where nothing was said. Princeville v. Austin, 77 Ill. 325.

The theory of dedication discussed. Hunter v. Trustees of Sandy Hill, 6 Hill (N. Y.), 407; Pearsall v. Post, 20 Wend. (N. Y.) 111; affirmed, 22 Wend. (N. Y.) 425; Curtis v. Keesler, 14 Barb. (N. Y.) 511.

Distinction between dedication as in favor of the public and as between owners and purchasers. Child v. Chappell, 5 Seld. (9 N. Y.) 246.

The public right does not depend upon a possession of twenty years. The use, however, ought to be for such a length of time that the public accommodation and private rights would be materially affected by an interruption of the enjoyment. City of Cincinnati v. Lessee of White, 6 Pet. (U. S.) 430 (1832).

Instances of dedication to public use: McConnell v. Town of Lexington, 12 Wheat. (U. S.) 582; Van Ness v. Mayor of Washington, 4 Pet. (U. S.) 232; Barclay v. Howell, 6 Pet. (U. S.) 498; New Orleans v. United States, 10 Pet. (U. S.) 662; Richardson v. City of Boston, 24 How. (U. S.) 188; Sargeant v. State Bank of Indiana, 4 McLean (U. S.), 339.

Where owner of land exhibits a map of it in which a street is defined, though not yet opened, and sells building lots with front or rear on the street, and makes no express reservation, he dedicates the street to public use. Barney v. Mayor and City of Baltimore, 1 Hugh. (Md.) 118.

§ 66. Must Be the Voluntary Donation of the Owner.—Dedication must originate in the voluntary donation of the owner of the land and be completed by the acceptance of the public. And to support a dedication there must be such a user and so accompanied by corroborating circumstances as clearly to demonstrate both.¹

¹ Morton, J., in Green v. Chelsea, 41 Mass. 80 (1836).

§ 67. **Form of the Dedication.**—No particular form of words or ceremony is necessary or required to the validity of a dedication of lands to public use. The assent of the owner and the use of the lands for the purpose intended by the appropriation are sufficient and estop the person making the dedication from revoking it.¹

§ 68. **A Grantee Competent to Take the Title.**—Dedication of lands for public purposes have frequently come under the consideration of the courts, and the objections which have been raised against their validity have been the want of a grantee competent to take the title, applying to them the same rule which prevails in private grants, that there must be a grantee as well as a grantor. But it is not the light in which the courts have considered such dedication for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor and to secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication.² The objection that there is no grantee to take the title does not prevent a valid dedication.³

§ 69. **By Whom Made.**—An absolute and final dedication of lands to a public use can only be made by the owner of an absolute fee.⁴

§ 70. **A Valid Dedication is Irrevocable.**—A dedication once made can not be recalled. The intention of the owner, at the time it was made, is alone to be considered, and not his intention at any subsequent time.⁵

¹ *Cincinnati v. White*, 6 Pet. (U. S.) 12 Wheat. (U. S.), 582; *Mayor, etc., S.* 430 (1832); *Morgan v. Railroad Co., v. United States*, 10 Pet. (U. S.) 662. 6 Otto (U. S.), 716; *Banks v. Ogden*, 4 Ward v. Davis, 3 Sandf. (N. Y.) 2 Wall. (U. S.) 57; *Sargeant v. State* 502; *Bangan v. Mann*, 59 Ill. 492. Bank, etc., 4 McLean, 339.

² *Cincinnati v. White*, 6 Pet. (U. S.) 12 Wheat. (U. S.), 582; *Mayor, etc., S.* 430 (1832). ³ *Rush v. City of Rock Island*, 5 Biss. (U. S.) 95; *Adams v. Saratoga R. R. Co.*, 11 Barb. (N. Y.) 414.

⁴ *McConnell v. Town of Lexington*,

CHAPTER XXI.

THE RIGHT TO REQUIRE THE PLAINTIFF'S ATTORNEY TO PRODUCE HIS AUTHORITY.

- § 1. Origin of the Law.
- 2. Maintenance Defined.
- 3. The Modern Rule.
- 4. A Stricter Rule in Actions of Ejectment.
- 5. Statutory Enactments.
- 6. Precedents.
- 7. When the Application Should Be Made.
- 8. A Detainer is Sufficient.
- 9. What Is a Sufficient Authority.
- 10. Authority May Be Implied.
- 11. Confidential Communications Not To Be Divulged.

§ 1. **Origin of the Law.**—The law requiring an attorney to produce his authority to prosecute an action of ejectment, seems to have had its origin in the ancient doctrine of maintenance. The old way of proceeding in ejectment as we have seen, was by sealing a lease on the premises by the party in interest who was to try the title; which indicated the necessity of possession as well as the right of entry. This mode of proceeding, at first, was held not to be maintenance, nor within the statute against buying titles, if the lease was made to servants or friends, who could not be presumed either to maintain or countenance the action; but if made to one of ability to maintain the suit it was otherwise. Attorneys were prohibited at an early date in England from taking a lease of the premises for the purpose of bringing the action, for in 1654, it appears to have been ordered by the Court of King's Bench that, "for the prevention of maintenance and brocade, no attorney could be lessee in an ejectment."¹

§ 2. **Maintenance Defined.**—Maintenance is the malicious, or, at least, the officious interference by a person in a suit in which he has no interest, to assist one of the parties to it against the

¹ Runninton on Ejectment (N. Y. Ed. 1806), 145.

other, with money or advice to prosecute or defend the action, without any authority of law.¹

It is curious to see how this doctrine of maintenance has, at different periods, been treated in the courts of English speaking people. At one time, not only he who laid out money to assist another in his cause, but he who, either by friendship or interest, saved him an expense which he otherwise would have incurred, was held guilty of maintenance. If he officiously gave evidence it was maintenance; so that he must have had a subpoena or suppress the truth. A doctrine so repugnant to good sense and justice could not long exist.²

§ 3. **The Modern Rule.**—In modern times it is a rule of practice of almost universal application in the administration of justice that where an attorney of the court appears for a party to an action, he may be recognized by the adverse party with safety and treated as such.³ The presumption that the attorney has ample authority to act will, in the absence of circumstances indicating fraud, be indulged.⁴ Courts, however, possess ample power to compel attorneys to produce their authority,⁵ but they will not usually exercise it, especially where the attorney is reputable and responsible.⁶

§ 4. **A Stricter Rule in Actions of Ejectment.**—In actions for the recovery of the possession of real property or where the title or right of possession of land is in controversy for the purpose of protecting the rights of the person in the actual possession, a stricter rule has been applied by the courts, and when it appears that the action is brought without authority the court will either stay the proceedings or dismiss the suit and compel the attorney to pay the costs.⁷

§ 5. **Statutory Enactments.**—As the fictions of the common-law action of ejectment fell into desuetude and were succeeded

¹ 1 Russell on Crimes, 176; 2 Bouvier's Law Dic., Tit. Maintenance.

² Runnington on Ejectment (N. Y. Ed. 1806.), 145.

³ Hamilton v. Wright, 37 N. Y. 402; Hallett v. Hastie, 35 Ala. 164.

⁴ Rogers v. Park, 4 Humph. (Tenn.) 480; Estey v. People, 23 Kan. 510.

⁵ Allen v. Green, 1 Bai. (S. C.) L. 448; Ninety-nine plaintiffs v. Vanderbuilt, 4 Duer (N. Y.), 632; 1 Abb. Pr. (N. Y.) 193.

⁶ Hamilton v. Wright, 37 N. Y. 502; American Ins. Co. v. Oakley, 9 Paige Ch. (N. Y.) 496; Jackson v. Stewart, 6 Johns. (N. Y.) 34; Anon., 1 Salk. 86; Anon., 6 Mod. 16; Cartwell v. Menifee, 2 Ark. 356; Republic, etc., v. Arrangois, 1 Abb. Pr. (N. Y.) 437; 5 Duer (N. Y.), 643; Denton v. Noyes, 6 Johns. (N. Y.) 296.

⁷ Weeks on Attorneys, § 78.

by the modern forms of procedure, a substitute for this rule prohibiting attorneys from becoming the lessee in actions of ejectment seems to have been found in statutory enactments of many States, requiring the attorney bringing the suit to produce his authority upon the application of the defendant. As an illustration we quote the statute of Illinois. Under these statutes the courts have no discretion. Upon application properly made the order will be granted with a stay of proceedings until the authority is produced.¹

Authority of plaintiff's attorney.

A defendant in ejectment may, at any time before pleading, apply to the court, or to any judge thereof in vacation, to compel the attorney for the plaintiff to produce to such court or judge his authority for commencing the action in the name of any plaintiff therein. Such application shall be accompanied by an affidavit of the defendant, that he has not been served with proof, in any way, of the authority of the attorney to use the name of the plaintiff stated in the declaration. 1 Starr & Cur. Statutes Ill. 983, § 16; R. S. 1845, 206.

§ 6. Precedents.

- (1) *Affidavit of defendant to support application for order that plaintiff's attorney produce his authority for commencing action.*

County of——, to wit: C. D., the defendant in this suit, being duly sworn deposes and says, that he has not been served with proof in any way, of the authority of E. F., whose name appears on the declaration in this suit as the attorney for the plaintiff, [or, "plaintiffs;"] therein, to use the name, [or, "names,"] of the plaintiff, [or, "plaintiffs,"] named in the said declaration; and further this deponent says not.

C. D.

Subscribed and sworn, &c.²

- (2) *Order requiring attorney to produce his authority.*

Title, etc.:

Ordered, That A. B., Esq., acting as attorney for the plaintiff in this cause, do forthwith produce to me his authority for commencing this action in the name of the plaintiff therein, and all proceedings on the part or in the name of the plaintiff therein, are hereby stayed, till such authority be produced.

Dated, &c.

S. CHEEVER, *Judge*.

¹ Carpenter v. Allen, 13 Jones & G. (N. Y.) 322; McDermott v. Davison, 1 How. Pr. (N. Y.) 194; Howard v. Howard, 11 How. Pr. (N. Y.) 80.

² Adams on Ejectment, 487.

This order is founded on an affidavit, stating "that the defendant has not been served with proof in any way, of the authority of the attorney to use the names of the plaintiffs stated in the declaration." Yates' Pleadings, 494.

(3) *Affidavit of plaintiff's attorney, that he is authorized to commence the action.*

County of ———, to wit: E. F., attorney for the plaintiff named in the declaration in this cause, being duly sworn, deposes and says, that he has received [or, "that he did on the ——— day of ——— last past (or, 'instant'), receive,"] from the said A. B., the said plaintiff, a written request of him, the said plaintiff, desiring this deponent to commence this suit, [or, "a written recognition of this deponent's authority to commence this suit;"] and further this deponent says not.

Subscribed and sworn, &c.¹

E. F.

§ 7. **When the Application Should Be Made.**—The application for a rule upon the plaintiff's attorney to produce his authority to begin and prosecute the suit, being somewhat in the nature of a dilatory motion, should be made at the first opportunity, or at least before the issue is joined in the suit,² though in some cases it may undoubtedly be made after issue is joined upon a proper application showing a reasonable cause for the delay, or omission to make the application at the first opportunity.³

§ 8. **A Retainer is a Sufficient Authority.**—A retainer for that purpose being the act of a client by which he engages an attorney to manage his suit, is of course a sufficient authority in all cases.⁴ While it need not be in writing, yet if the attorney neglects to take this precaution, and he is afterward called

¹Adams on Ejectment, 488.

² In Pennsylvania it was held that a defendant could require the plaintiff's attorney to file his warrant of attorney, in order that he might learn by whose authority the suit had been instituted; but the application came too late if made after the pleas were filed and the cause at issue. *Mercier v. Mercier*, 2 Dall. 142; *Campbell v. Galbreath*, 5 Watts, 423.

³ In a real action, where a writ of right was sued out, the issue joined

upon the right, and the tenant subsequently produced affidavits showing that the demandant died before the institution of suit; he having been ignorant of this fact until after the issue was joined, all proceedings were stayed until the person who instituted the suit for his own benefit proved that the demandant was living when the writ issued. *Howard v. Rawson*, 2 Leigh (Va.), 733; see also *Gynn v. Kirby*, 1 Stra. 402; *Hamilton v. Wright*, 37 N. Y. 502.

⁴ *Foulk v. Falls*, 91 Ind. 315.

upon to produce his authority, he may run the risk of having the suit dismissed at his own costs.¹

§ 9. **What is a Sufficient Authority.**—What is a sufficient authority for an attorney in bringing an action of ejectment must depend in a measure upon the facts of each particular case. Under the practice in Illinois in answer to a rule upon an attorney to produce his authority, he exhibited a power of attorney, regularly signed by four out of the five plaintiffs. But it appeared that the fifth, a married woman, had not been named in its execution by her husband.² The authority was held sufficient. In New York an instrument signed by one of two joint owners of the lands in controversy in his own name and that of his co-joint owner with the verbal consent of the latter, who appears to have been about requesting the attorney to continue the ejectment suit was held sufficient.³ A case arose in Tennessee before the ancient fictions were abolished in that State in which the name of R. was used as the lessor, without his consent, by his co-plaintiffs, claiming a joint interest in the lands in controversy. Upon a motion made by the defendants, it appeared that R. was dead at the time of commencement of the action, and that his name was used without authority. The court ordered his name stricken out of the record and allowed the survivors to continue the suit.⁴ But a general agent, whose principal is absent from the State, having authority to manage the property and business of his principal and take and hold possession of lands, is not authorized, it seems, to employ an attorney to bring an action to recover such possession.⁵

Under the statute of Illinois any written recognition of the attorney's authority to commence an action of ejectment, duly proved as therein provided, is made presumptive evidence of such authority at the time the suit was brought. Where a written recognition of an attorney's right to prosecute an action of ejectment for lands situate in one county, inserts the name of another county as the place where the suit is to be prosecuted, the naming on the wrong county will be regarded as a clerical error, and will be rejected as meaningless. Authority to prosecute such a suit necessarily implies authority to prosecute it in the county where the land lies. *Stream v. Lloyd*, 128 Ill. 493 (1889).

¹ *Wiggins v. Reppin*, 2 Beaver, 403. ⁴ *Grier v. Smith*, 7 Yerg. (Tenn.)

² *Lockwood v. Mills et al.*, 39 Ill. 487.
603 (1864).

⁵ *Howard v. Howard*, 11 How. Pr.

³ *Howard v. Howard*, 11 How. Pr. (N. Y.) 80.
(N. Y.) 80.

§ 10. Authority to Bring the Suit May Be Implied.—

Where an owner of lands, held in adverse possession, conveys the same to a person other than the one in possession, the presumption that the grantor has authorized the grantee to use all legal means to obtain possession of the land conveyed fairly arises from the delivery of the deed, and if necessary he may proceed in the grantor's name for that purpose.¹

The plaintiffs Hamilton and Livingston conveyed the premises in controversy to their co-plaintiff, Gleason, while the defendant was in possession, holding adversely. Gleason instituted an action of ejectment in the name of his grantors, without their knowledge or consent. The defendant defeated them in the action and obtained a judgment for costs against all of the plaintiffs. It was held that the grantors were bound by the attorney's appearance, and were liable to defendant for the costs, notwithstanding the ejectment was prosecuted without their knowledge or sanction, and at the sole instance, and for the exclusive benefit of the grantee. *Hamilton v. Wright*, 37 N. Y. 502; see also *Couch v. Turner*, 17 Ga. 489; *Denton v. Noyes*, 6 Johns. (N. Y.) 296; *Taylor v. Trask*, 7 Cow. (N. Y.) 249; *Gaillard v. Smart*, 6 Cow. (N. Y.) 385; *Meacham v. Dudley*, 6 Wend. (N. Y.) 514.

§ 11. Confidential Communications Not To Be Divulged.

—The rule which permits the defendant to require the plaintiff's attorney to produce in court his authority for bringing the action does not allow him to compel the attorney to divulge any matters privileged under the rule governing confidential communications between him and his client; as, for example, the attorney can not be compelled to testify as to whether, in bringing the action for the plaintiff in his capacity as administrator, he was not also employed to maintain the plaintiff's individual claims to the land.²

¹ *Staple v. Downing*, 60 Ind. 478; *Forman v. Peterson*, 111 Mass. 148. *Hamilton v. Wright*, 37 N. Y. 502; ² *Stephens v. Mattox*, 37 Ga. 289. *McMahon v. Bowe*, 114 Mass. 140;

CHAPTER XXII.

ADVERSE POSSESSION IN ACTIONS OF EJECTMENT.

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§ 1. **Adverse Possession—The Term Defined.**—A possession of real property which is inconsistent with the rights of the real owner.¹ It may be laid down as a general rule of law that, to constitute an adverse possession, two things must concur: first, an ouster of the real owner, followed by an actual possession by the adverse claimant; and second, an intention on his part to oust the owner and take possession himself.² It consists of an exclusive, actual, continued occupation under a colorable claim of title.³

Adverse possession in general.

"Our law permits all persons, whether in or out of seizin or possession, to transfer their claim, such as it is, good or bad, by deed or will. And I have no manner of doubt, that one who enters as a trespasser, clears land, builds a house and lives in it, acquires something which he may transfer to another; and if the possession of the two added together amounts to twenty-one years, and was adverse to him who had the legal title, the act of limit-

¹ 1 Am. & Eng. Ency. 225; Sweet's Law Dic., Tit. Adverse Possession; Bouvier's Law Dic., same title; 165. French v. Pearce, 8 Conn. 441; Dixon v. Cook, 49 Miss. 226.
² Davis v. Bowman, 55 Miss. 765.
³ Taylor v. Burnside, 1 Gratt. (Va.)

ations will be a bar to his recovery." Tilghman, Ch. J., in *Overfield v. Christie et al.*, 7 S. & R. (Pa.) 177.

Possession as owner is an essential condition by which the ownership of immovables can be acquired without title or possession in good faith. *Stille v. Schull*, 41 La. Ann. 816; 6 So. Rep. 634 (1889).

To constitute an adverse possession, there need not be a fence, a building, or other improvements made; it suffices for this purpose that visible notorious acts are exercised on the premises in controversy, for twenty-one years after an entry under a claim and color of title. *Lessee of Ewing v. Burnett*, 11 Pet. (U. S.) 41.

Illustrations.

What constitutes adverse possession.

One of the heirs of a deceased owner having conveyed 4,000 acres of land by a deed purporting to grant the whole estate, the purchaser inclosed it, and 30,000 acres of other land, with a post and wire fence. The inclosure contained some land not owned or leased by the purchaser, and a few other people lived in the inclosure, and owned cattle that ranged therein; but the purchaser controlled the fences and gates, and excluded all cattle except such as he permitted to remain. His deed had been duly recorded, and he paid all taxes. This possession continued for over five years. *Held*, in trespass to try title brought by the other heir, that there was sufficient evidence of adverse possession to justify a charge on the statute of limitations. *Church v. Waggoner* (Tex.), 14 S. W. Rep. 581 (1890).

Actual occupation of land for twenty-one years, however tortious, or destitute of color of title, gives a right to the extent of the inclosure, against all the world, but the State. *Munshower v. Patton*, 10 S. & R. (Pa.) 334.

A devised certain lands, in fee, to four persons, and the portion of C, a daughter and heir of one of them, was ascertained and conveyed to her husband, in 1772, by the deed of the devisees, which also appointed persons to locate and reduce to severalty her share, on any of the land in the possession of the devisees or their tenants. The defendant entered, claiming title under C's husband, more than twenty years before suit brought, and the lessor claimed title under the devisees. *Held*, a good adverse possession, though defendant may have taken it from some of their tenants, as it would be presumed to have been rightfully taken in consequence of a location of C's portion, under the deed. *Jackson v. Hallenbeck*, 13 Johns. (N. Y.) 499.

The State conveyed all its rights in a canal, which it had undertaken to construct, to a corporation, which afterward abandoned it. The municipal authorities filled the canal at street crossings, and an ordinance required the intermediate parts, in which stagnant water collected, to be filled by the owners of lots, which was done, at great expense. Afterward, on a bill alleging the insolvency of the corporation, and abandonment of the canal, the property was sold under decree of the United States Circuit Court. In ejectment by the purchaser, *held*, that he could not evade defendants' claim by adverse possession by alleging that the canal was a public highway, and that filling it was a nuisance out of which no prescriptive rights could arise. Defendants, having been in adverse possession for twenty years before suit brought, obtained title, though that period had not elapsed since the sale. *Collett v. Board Com'rs County of Vanderburgh*, 119 Ind. 27; 21 N. E. Rep. 329 (1889).

In ejectment, defendant claimed title under a tax deed and under the statute of limitations, and it appeared that in 1869 a brother of defendant obtained a tax deed to the land, and in 1871 or 1872 entered upon it, and cleared and fenced some of it, and cultivated it until January, 1878, when defendant, who had also obtained a tax deed to it, and whose title was by arbitration decided to be the best, immediately took possession, and so continued until the institution of this suit, August 20, 1885. *Held*, that these possessions were actual, adverse, under claim and color of title, and for more than ten years, and therefore defendant is entitled to the portion of the land claimed under them. *Bakewell v. McKee*, 101 Mo. 337; 14 S. W. Rep. 119; Am. Dig. 1890, 51.

In an action for land claimed by defendants under a gift to their mother from her brother, who was plaintiff's father, it appeared that plaintiff's father had purchased his sister's interest in their father's estate at a low price, and that he told a witness that he felt an obligation to assist her, and proposed to buy her a home, and that he got witness to select the land in suit, of which he afterward put her in possession. She made improvements and paid taxes, claiming the land as her own. *Held*, that the entry and possession were under a claim as purchaser and not as tenant. *Ray v. Thurman's Ex'r* (Ky.), 15 S. W. Rep. 1116; Am. Dig. 1891, 46.

Land which had been allotted to the deceased owner's widow as dower was sold and conveyed in proceedings instituted by the guardian of the infant heirs. *Held*, that possession under such deed by the purchaser and his grantees for twenty years barred the right of the heirs to the land, though the proceedings under which the guardian's sale was made were invalid, and the widow did not die until the expiration of the twenty years. *Following Iron Co. v. Fullenwider*, 87 Ala. 584; 6 So. Rep. 197; *Lowery v. Davis* (Ala.), 8 So. Rep. 79; Am. Dig. 1891, 59.

A father owned a three-acre lot, from which he had fenced off an acre on the south side. In 1875 he conveyed the south part of the lot by metes and bounds to his son, who took possession and occupied to the fence. In 1880 the son conveyed to the plaintiff, who occupied to the same line until 1887, when he sued to recover a strip lying north of the fence. About the time of the conveyance to the son, he and his father built a substantial fence on the line of the old one. The line was fixed with much care, and established as the boundary line between them. Thereafter the father and his grantees continuously occupied, improved and claimed as their own the strip in controversy. *Held*, that the father and his grantees had acquired title by adverse possession. *Irwin v. Woodmansee* (Mo.), 16 S. W. Rep. 486; Am. Dig. 1891, 46-47.

In an action to determine plaintiff's right to maintain a certain dam, extending from the eastern bank of a river to an island which, with the western bank of the river, belonged to defendant, the allegations of the complaint that plaintiff for more than twenty years immediately succeeding the year 1847, to wit, for forty years thereafter, continuously and uninterruptedly maintained said dam, at the same height, abutting the same on said island at the same point, with the full knowledge of those claiming adverse interests in said island and westerly shore, and against the interests of such claimants or owners, under a claim of right so to do, show with sufficient clearness that one of plaintiff's claims is title by prescrip-

tion. *Pioneer Wood Pulp Co. v. Chandos* (Wis.), 47 N. W. Rep. 661; Am. Dig. 1891, 52.

On a petition for the assessment of damages for land taken by a railroad company, it appeared that most of the land taken was a beach, which had been treated for many years as a part of petitioner's estate. No other person had ever claimed it, or damages for its taking. The railroad company in its location and plans had always described it as petitioner's; and, as to the adjoining upland taken, the evidence of twenty years' occupation was clear, and no attempt was made by defendant to have the different parcels distinguished. *Held*, that this would sustain a finding of adverse occupation of the beach by the petitioner for twenty years. *Andrew v. Nantasket Beach R. Co.* (Mass.), 25 N. E. Rep. 966; Am. Dig. 1891, 51.

Land was sold under execution to A, who, without taking a deed from the sheriff, sold to B, who took possession of the land, which by sundry conveyances came to defendants. *Held*, that it was proper to instruct the jury that if defendants and those under whom they claimed took actual possession of the land in 1860 with claim of adverse title, continuing such possession for fifteen years next before suit brought, the jury must find for defendants. *Henderson v. Bonar* (Ky.), 11 S. W. Rep. 809; Am. Dig. 1889, 48.

Where a grantee of land believes that his grant includes a lot adjacent thereto, and therefore incloses the latter within his general fence, and henceforth continuously cultivates such lot from year to year for more than twenty years, he acquires title thereto by adverse possession. *Brown v. Morgan*, 44 Minn. 432; 46 N. W. Rep. 913 (1890).

In an action of ejectment it appeared that defendant had had possession of and cultivated a part of the premises in dispute for more than ten years after cause of action accrued. *Held*, that such possession constituted adverse possession sufficient to sustain defendant's title under the laws of Nebraska. *Malcom v. Hansen* (Neb.), 48 N. W. Rep. 883; Am. Dig. 1891, 46.

Defendant purchased a lot of land, and took a deed of the whole, in which the grantor stated himself to be heir of the patentee, and took possession under it, but it afterward appeared that the grantor had title only to one-ninth part of the lot, as tenant in common. *Held*, a good adverse possession of the whole lot. *Jackson v. Smith*, 13 Johns. (N. Y.) 406.

What does not constitute adverse possession.

Defendant testified in support of his claim of adverse possession that plaintiff's grantor "told me to go on the place and live on it, and make it my home, and he would give it to me for to stay there permanently;" that he was to take some sheep of the grantor's firm on the place, and take care of them on shares; that he afterward agreed to take a lease from plaintiff if one could be made to suit him; and that during part of the time of his possession he caused the land to be assessed to plaintiff. He would not deny that he knew of an offer made by his wife during the time to purchase the land from plaintiff, or that he did not object thereto. *Held*, that the evidence failed to show adverse possession. *Smith v. Smith*, 80 Cal. 323; 21 Pac. Rep. 4; 23 Pac. Rep. 186 (1889).

A built eleven inches from the line of his lot. B built, placing his underground foundation under the eleven inches, starting his wall at the surface on the line, and carrying it up so that it touched A's wall above, and he

closed the passage by a wall in the rear. The occupants of A's building used the passage so formed. In A's ejectment, though B's building had been maintained more than twenty years, *held*, that there was no adverse possession. *Miller v. Platt*, 5 Duer (N. Y.), 272.

In 1872, a father and mother deeded land to their son. The father then deserted his family and left the State. The mother continued in possession until her death, in 1885, but asserted no decided adverse claim as against her son. She acquired an invalid tax title to the land in 1884, and at her death devised the land to her daughter, defendant in ejectment. In 1882, defendant and her other brothers and sisters filed a bill against the brother to whom the land had been deeded to set the conveyance aside, but the suit was discontinued. At the death of her mother defendant qualified as executrix, and filed an inventory of the property, including the land in question, describing it as a "tax title." *Held*, that defendant did not make out title by adverse possession as against plaintiff, claiming under the deed to her brother. *Paldi v. Paldi*, 84 Mich. 346; 47 N. W. Rep. 510 (1891).

A tenant for life under a will made a deed purporting to convey the fee to the defendants' grantors, who during her life bought some of the interests in the remainder. At her death, in 1860, this had vested in the testator's brothers and sisters and their heirs, and since then the defendants and their grantors have been in exclusive possession, and made permanent improvements, which the answer alleges to have been in good faith. In 1858, the grantors of the defendants' filed a petition stating that the tenant for life had conveyed to them all her interest, "being a life estate," and to perpetuate testimony to prove the names of the brothers and sisters and their heirs. In an ejectment by one of these, soon after the death of the life tenant, the defendants' grantors joined in an agreed statement of facts, setting out that proceeding, and the names of the brothers and sisters and some of the children. After final judgment for plaintiff, they authorized trustees to buy in for them the outstanding title of three children of one of the brothers, which was done, and afterward the interests of other heirs were also bought in, by way of compromise and buying the peace. In one of the deeds taken by the trustees, the number of the brothers and sisters, and their having the estate in remainder at the death of the life tenant, are recited. *Held*, in partition by the complainants as heirs of one of the sisters, that it does not follow as a matter of law, that defendants have title by adverse possession, and a motion to stay proceedings until the complainants establish their right of possession at law will be overruled. *McClaskey v. Barr*, 42 Fed. Rep. 609 (1890).

Plaintiff, in ejectment to recover certain lots in the town of B., proved the legal title in himself from the United States; and defendant, in order to establish ownership by adverse possession, proved that his grantors, in 1861, entered upon a tract of land including said lots, under a parol agreement for conveyance, which was afterward made, and which described certain lots and blocks in said town of B., including block 12, on which said grantors were then residing, and where they continued to reside. Such conveyance did not, however, include the plaintiff's lots. Defendant proved that thereafter his grantors received conveyances from plaintiff's grantors for land, including block 12, and plaintiff's lots; but subsequent in time to the conveyance through which plaintiff deraigned his title. Defendant's

grantors, after obtaining said conveyances from plaintiff's grantors, inclosed the land by a fence, and used it as a pasture. They finally removed the fence, leaving the lots open and unoccupied, but claimed ownership, and sold them to defendant, and he entered into actual possession. The proof did not show an actual continued occupancy of the lots by defendant and his grantors for the full period of ten years prior to the action. *Held*, not such an adverse possession as would defeat plaintiff's right of entry. *Hicklin v. McClear*, 18 Or. 126; 22 Pac. Rep. 1057 (1890).

A. entered into possession of land without title, and afterward entered into a contract with T., who covenanted to give him a deed for the land. A. assigned the contract to S., who took possession, and afterward received the deed from T., and afterward a deed from B., the patentee and true owner: *Held*, that the original possession of A., being without title, was to be deemed the possession of B., the patentee; and that the possession of S., under the covenant from A. to T., was not adverse. *Jackson v. Bonnell*, 9 Johns. (N. Y.) 163.

A possession of a lot of land commenced adversely twenty-five years ago by clearing of four or five acres, without showing on what part such clearing was made, and a regular deduction of title, or privity, and continuity of possession down to the defendant, is not such an adverse possession as will bar the plaintiff. *Doe v. Campbell*, 10 Johns. (N. Y.) 475.

A conveyance, by one of the children of a decedent, of her interest as one of said children, does not pass title to the grantor's interest in the estate of her sister dying after execution of the deed. Occupancy of the land by the grantee in such deed and those claiming under him, claiming solely under the deed, is not adverse to the grantor as to her interest in the share of the deceased sister, so as to bar her right by limitation, the land never having been divided. *Gardner v. Pace* (Ky.), 11 S. W. Rep. 779; *Am. Dig.* 1889, 50.

The son entered upon and occupied the father's land for more than twenty years, with his permission, and in the expectation that the father would convey or devise it to him: *Held*, not an adverse possession. *Howard v. Howard*, 17 Barb. (N. Y.) 663.

One who takes possession of vacant land with the intention of finding the owner, and purchasing from him, has not adverse possession within the meaning of Rev. St. Tex., Art. 3198, which defines adverse possession to be "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." *Mhoon v. Cain*, 77 Tex. 316; 14 S. W. Rep. 24 (1890).

Possession of land by defendants and their grantors, accompanied by the erection of wharves and other buildings thereon, would not be adverse when the conveyance under which they claim showed that they had no title to the excepted land, and their own subsequent conveyances recognized and repeated the exception. Affirming 6 N. Y. S. 628. *City of New York v. Law*, 125 N. Y. 380; 26 N. E. Rep. 471 (1891).

Possession of a strip of land belonging to an adjoining owner, under a belief that it is the possessor's own, and without any intention of appropriating land belonging to such adjoining owner, is not adverse, so as to pass title by limitation. *Wacha v. Brown*, 78 Iowa, 432; 43 N. W. Rep. 269 (1889).

Property having been held by trustees under a trust void for uncertainty, not for the use of themselves, but for the use of a society which is incapable of taking title to it, no lapse of time will bar the right of the beneficial owners. *Heiskell v. Trout*, 31 W. Va. 810; 8 S. E. Rep. 557 (1889).

It appeared that defendant conveyed land to his brother, and removed from it. Two years later his brother moved him back into a house on the land conveyed, but not on the land in suit, and afterward helped him build a small house on the land in suit, into which he moved and resided, cultivating about an acre of the land as a garden, and sometimes pasturing cattle on the land in suit, but doing no other act evincing a claim of title, and holding possession by permission of his brother. *Held*, that defendant's possession was not adverse. *Nau v. Brunette* (Wis.), 48 N. W. Rep. 649; Am. Dig. 1891, 46.

Where the defendant, having taken a lease of lot No. 1 from the plaintiff, negotiated with him for the purchase of the adjoining strip of land, though he may show that the strip is included in the demise, he can not set up adverse possession. *Jackson v. Britton*, 4 Wend. (N. Y.) 507.

Digging away some of the soil and piling railroad ties on land, when not done under claim of ownership nor by the possessor of a paper title, do not constitute adverse possession, within the meaning of the statute of limitations. *Chicago & N. W. Ry. Co. v. Galt* (Ill.), 24 N. E. Rep. 674; Am. Dig. 1890, 38.

One having a constructive but mixed possession of lands under a void tax deed, and not in actual possession of any part thereof, can not acquire title by adverse possession. *Deputron v. Young*, 134 U. S. 241; 10 S. Ct. Rep. 539 (1890).

Where land is conveyed by a father to a son as an advancement, the father can not afterward claim title to the land by adverse possession. *White v. White*, 52 Ark. 188; 12 S. W. Rep. 201; Am. Dig. 1889, 51.

§ 2. Adverse Enjoyment.—The term “adverse enjoyment,” often found in the books, is only another way of expressing the idea expressed by the term “adverse possession.”

§ 3. Adverse User.—The term “adverse user” is often used in connection with adverse possession, and is defined to be such a use of real property as the owner himself would make, asking no permission and disregarding all other claims to it so far as they conflict with such use.¹

§ 4. Permissive Possession.—Where the possession is the result of an entry upon the premises by permission of the legal owner, such possession is termed in law permissive, and it will not become adverse until some disloyal act is committed by the occupant rendering it so and notice thereof is brought home to the owner of the legal title.²

¹ *Blanchard v. Moulton*, 63 Me. 434; 1 Am. & Eng. Ency. 226. ² *Harvey v. Tyler*, 2 Wall. (U. S.) 328; *Allen v. Allen*, 58 Wis. 202;

Where abutting or adjoining land owners cultivate and occupy a part of the right of way granted by Congress as an easement to a railway company, such possession must be regarded as permissive only, and not hostile or adverse, so as to confer title. *Union Pac. Ry. Co. v. Kindred*, 43 Kan. 134; 23 Pac. Rep. 112 (1890).

The fact that a portion of the dam was across a navigable stream raises no presumption that plaintiff's possession was permissive on the part of defendant. *Pioneer Wood Pulp Co. v. Chandos (Wis.)*, 47 N. W. Rep. 661; Am. Dig. 1891, 52.

The fact that a person in possession of land rented part of it in his own name, and had wood cut from it on shares, is not inconsistent with the permissive character of the possession, especially where it appears that the owner let him have the land rent free, and also furnished money for his support. *Meier v. Meier (Mo.)*, 16 S. W. Rep. 223; Am. Dig. 1891, 42-46.

§ 5. Adverse Possession and the Statutes of Limitation.—

The question of adverse possession is inseparably connected with that of the statute of limitations, for if there were no statute limiting the right of entry upon, or of bringing an action of ejectment, there would be no necessity for determining whether such possession be adverse or not. Possession in law is *prima facie* evidence of legal title; but, if the title to the property is in some person out of possession, were it not for the statute of limitations, such possession would avail nothing.

It is impossible to understand the subject under consideration without some knowledge of the purposes of these statutes.

The subject of the adverse possession has always been one of considerable interest; in the United States, it has become one of very great importance, and has elicited much legal discussion and judicial decision.

"The object of the statute of limitations is to secure the individual from the machinations of dishonesty when attempted under the advantages attendant upon the lapse of time, loss of papers, and death of witnesses. But, when cases present themselves in which no laches can be imputed to the plaintiffs, but great injustice would be done by applying to such cases the effect of the statute, the conclusion of reason and of the law is that such cases were not in the mind of the legislature when enacting the law. Such

Plimpton v. Conruse, 44 Vt. 158; *Davis v. Bowmar*, 55 Miss. 671; *Hoys Morrill v. Titcomb*, 8 Allen (Mass.), v. *Morrison*, 30 Ga. 971; *Cooper v. 100*; *Sherman v. Kane*, 86 N. Y. 57; *McBride*, 4 Houst. (Del.) 461; *Thomas Kothan v. Rockwell*, 16 Hun (N. Y.), v. *Jones*, 28 Gratt. (Va.) 383; *Con v. 90*; *Chance v. Branch*, 58 Tex. 490; *Fanpel*, 24 W. Va. 238; *Dean v. Ford v. Holmes*, 61 Ga. 419; *Perkins Brown*, 23 Md. 11; *Alexander v. v. Nugent*, 45 Mich. 156; *Smith v. Wheeler*, 69 Ala. 332; *Davenport v. Stevens*, 82 Ill. 554; *Calvin v. McCune*, Lebring, 52 Iowa, 365; *Eddy v. St. 39 Iowa*, 502; *Law v. Smith*, 4 Ind. Mars, 53 Vt. 462; 88 Am. Rep. 695. 56; *Pease v. Lawson*, 33 Mo. 35;

are the cases of a want of parties, plaintiff or defendant, whereby a temporary suspension of legal remedy takes place. But, in no case of a voluntary abandonment of an action, has an exception to the statute of limitations been supported." Johnson, J., in *Richards v. Maryland Ins. Co.*, 8 Cranch (U. S.), 92.

§ 6. **The Statute of Limitations Discussed by Senator Viele, of the Old Court of Errors (N. Y.).**—"More than two centuries have elapsed since the enactment of the English statute of limitations,¹ and which has been adopted in this country, and was substantially re-enacted soon after the reorganization of our government. It was adopted in England after near a century of experience under a statute of Henry VIII, of more than double the period intended, and calculated to impose diligence on, and vigilancy in him that was to bring his action, and it has been sustained by the united concurrence and approbation of all succeeding legislatures and jurists to the present time. No one who has reflected upon the subject, and whose observation and experience qualify him to judge, but will sanction and applaud the wisdom and policy of a statute, the object and obvious tendency of which is to promote the peace and good order of society by quieting possessions and estates, and avoiding litigation. But for the intervention of the statute there would be no end to the revival of dormant and antiquated titles, as many an honest citizen, who now, by its benignant operation, enjoys, in security, the few acres his industry has acquired, and which have been improved by his labor and enriched by the 'sweat of his brow,' would be driven from his home by an enemy more insidious and more destructive to the peace of community than an invading army, going upon the presumption that a valid claim will not be forborne for any great length of time, and that a possession and occupancy bearing an aspect of right will not be acquiesced in but for some availing reason. The legislature intended to give a force and efficacy to such evidence of right that should make it effectual to the protection of him who had the advantage of it, and for that purpose it was enacted: that 'no person shall at any time hereafter make entry into any manors, lands, tenements or hereditaments, but within twenty years next after his right or title descended or accrued to the same.'"²

¹ Statute 21, James I, Chapter 16. *La Frombois v. Jackson*, 8 Cow.

² 1 Revised Laws N. Y. (1826) 185; (N. Y.) 615; opinion by Senator Viele.

§ 7. **Construction of the Statute.**—Courts should adhere to the literal expressions of the statute and every construction derived from a consideration of its reason and spirit should be discarded.¹ General words in a statute should receive a general construction unless there be something in the statute to restrain them, or, as it is otherwise frequently expressed, if there be no express exception.²

§ 8. **Inquiries Under the Statute.**—In all cases where the question of a statute of limitation presents itself the real inquiry is properly limited to a few simple topics, as (1) when did the cause of action arise, (2) when was the suit commenced, and (3) how long a period has elapsed from the time the cause of action arose to the time when the suit was commenced.³

§ 9. **When Adverse Possession Commences and the Statute Begins to Run.**—The essential elements of an adverse possession are an actual, open, notorious, continuous and visible appropriation and occupation of the lands intentionally hostile to and inconsistent with the rights and interests of the real owner.⁴ Upon the theory that the real owner by force of his title is in possession and so remains until ousted by another who enters with a claim of adverse possession, we are able to fix the point at which the adverse possession begins. When the entry is made and the ouster of the real owner is complete, and the

¹ *Demorest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Bennett v. Worthington*, 24 Ark. 492; *Adams v. Davis*, 47 Ga. 341; *Kincaid v. Richardson*, 9 Abb. (N. C.) 319; *McDonald v. Underhill*, 10 Bush. (Ky.) 590; see *Sacia v. De Graaf*, 1 Cow. (N. Y.) 356; *Bank v. Dolton*, 50 U. S. (9 How.) 522; *Traup v. Smith*, 20 Johns. (N. Y.) 33.

² *Harrington v. Smith*, 20 Wis. 60; *Encking v. Simmons*, 28 Wis. 276; *Demorest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; see *Torrence v. McDougald*, 12 Ga. 530; *Collins v. Carman*, 5 Md. 505, 553.

³ *Amy v. Watertown*, 22 Fed. Rep. 420; *Demorest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Cook v. McGinnis*, Mart. & Y. 361; *York v. Bright*, 4

Humph. (Tenn.) 312; *Miles v. Berry*, 1 Hill (S. C.), 296; *Howell v. Hair*, 15 Ala. 194; *Arrowsmith v. Durell*, 21 La. Ann. 295; *Yale v. Randle*, 23 La. Ann. 579; *State v. Willie*, 46 Mo. 236; *Callis v. Waddy*, 2 Munf. (Va.) 511; *Conner v. Goodman*, 104 Ill. 365; *State Bank v. Morris*, 13 Ark. 291; *Fee v. Fee*, 10 Ohio, 469; *Favorite v. Booher*, 17 Ohio St. 548; *Smith v. Bishop*, 9 Vt. 110; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Leonard v. Pitney*, 5 Wend. (N. Y.) 30; *Bucklin v. Ford*, 5 Barb. 393; *Woodbury v. Shackelford*, 19 Wis. 55; *Lindsay v. Fay*, 28 Wis. 177.

⁴ *Blanchard v. Moulton*, 63 Me. 434; *Davis v. Bowman*, 55 Miss. 765; *Mhoon v. Cain* (Tex.), 14 S. W. Rep. 24 (1890).

occupancy is replete with the essential elements of an adverse possession, then the statute of limitations begins to run.¹

§ 10. **Sufficiency of the Entry and Ouster.**—The entry being made, the ouster of the real owner follows as a matter of course or as a legal consequence of the entry, for there can not be two possessions, actual or constructive, of the same premises at the same time. But what will be sufficient as an entry to oust the real owner, depends upon a variety of considerations, such as the previous relations of the parties, whether they are strangers or in some privity with one another, the nature of the soil and the uses for which it is suited, the actual or constructive possession of the real owner, and the character of the entry, as made under a mere naked claim, or under color of title. The entry and ouster may be either actual, as by a physical invasion and a forcible expulsion of the occupant, or constructive, as where one holding the possession under the real owner disavows his right by some disloyal act. The principal essentials of the entry sufficient to set the statute of limitations in motion are: (1) its sufficiently open and notorious character for the purpose of giving the real owner actual or constructive notice of the fact, and (2) its hostility, sufficient to give him notice of its character. Such notice or knowledge, or the means by which such knowledge may be attained, must be brought home to the real owner or person who was possessed of the land; for the statute proceeds on the ground that he, knowing that a cause of action exists in his favor for the intrusion, yet acquiesces in it, and does not attempt to regain the possession of his land in the mode provided by law. A clandestine entry or possession will not set the statute in motion, because the owner of the land can not be said to have acquiesced in the wrongful entry or possession. The owner will not be condemned to lose his land because he has failed to sue for its recovery, when he had no notice that it was held or claimed adversely; but the statute cuts off his remedy only when he has neglected to commence his action beyond the period assigned for it.²

§ 11. **Disabilities Under the Statute.**—Where the legislature has made no exceptions to the statute of limitations,

¹ Thomas v. Marshfield, 13 Pick. (Mass.) 250; Robinson v. Lake, 14 Iowa, 421, 424; Bradley v. West, 60 Mo. 41.

² Thompson v. Pioche, 44 Calif. 508.

courts have no power to do so, no matter how meritorious the occasion for such exceptions may be.¹ A party can only avail himself of the disabilities existing when the right of action first accrues; therefore, where a plaintiff is under the disability of infancy only when her right of action first accrues, and afterward marries before she becomes of full age, her coverture is not available as a disability within the statute. The disability of infancy alone can be taken into account to avoid the effect of the statute. The period of infancy only and not that of her coverture can be added to the time allowed her for bringing the action. Successive or cumulative disabilities are not within the policy or settled and sound construction of the statute.²

Insanity of disseizee.

In ejectment, the issue being as to the mental condition of plaintiff's ancestor during a period of years in which defendant occupied the premises adversely, the court charged that if the ancestor was so mentally diseased during that period as to be unable to understand and assert his rights—to know that he was the owner of the land, and that defendant was in possession and asserting rights, and that such possession might eventually destroy his ownership—plaintiffs would be entitled to recover, notwithstanding defendant's adverse possession: *Held*, that the instruction was unexceptionable. *Warlick v. Plonk*, 103 N. C. 81; 9 S. E. Rep. 190 (1889).

Running of statute against insane persons.

Code Ga. § 2686, provides that no prescription works against the rights of an insane person so long as the insanity continues; but he has a like number of years after the disability is removed to assert his claim against the person prescribing. *Id.* § 2687, provides that, on the removal of a disability a prior possession may be added or tacked to the subsequent possession to make out the prescription: *Held*, that title by prescription might be asserted against one setting up the disability of insanity where such person was not continuously insane, and different lucid intervals amounted to the period of prescription. *Verdery v. Savannah, F. & W. Ry. Co.*, 82 Ga. 675; 9 S. E. Rep. 1133 (1889).

Infancy.

In trespass to try title it appeared that the husband and father of plaintiffs had received a deed thereof from his brother, the defendant's grantor, in 1858, but died in 1867, without ever having been in possession; that just

¹ *Demorest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Somerset Co. v. Veght*, 44 N. J. L. 513; *Van Stanwyck v. Washburn*, 59 Wis. 483; 48 Am. Rep. 534; *Lewis v. Lewis*, 7 Ired. L. (N. C.) 73; *Thompson v. Egbert*, 17 N. J. L. 462; *De Mill v. Moffatt*, 49 Mich. 125; 13 N. W. Rep. 387. ² *Cozzens v. Farnam*, 30 Ohio St. Ch. 491; 27 Am. Rep. 473; *Parmelee v. McGinty*, 52 Miss. 482; see *Bunce v. Walcott*, 4 Day (Conn.), 298; *Demorest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129.

before his death his brother had written to him to come back, and make a home on that place; that his brother had told others that he was to have the place in return for money which the brother had used, that was coming to him from their grandfather's estate, and had testified in a suit, in which his creditors had seized personal property, that his brother owned the land conveyed by the deed, in which was included the property in question; that the brother never repudiated his title till after his death, when, in 1871, he verbally sold the premises to his son, the defendant, no deed, however, being made until 1875. *Held*, that the possession of defendant's grantor was not adverse to the husband and father of plaintiffs, and that the statute did not begin to run against them until the conveyance to defendant in 1871; and, though the right of the widow was barred, that of the daughter, because of her infancy, was not affected. *Nichols v. Nichols*, 79 Tex. 332; 15 S. W. Rep. 272 (1891).

§ 12. Different Disabilities Existing at the Same Time.

—Supervenient or cumulative disabilities never arrest or prolong the bar of the statute, and the period of the bar should not be extended by tacking it to the time allowed for bringing suit after the removal of one disability when the party has already had its full benefit.¹ If several disabilities exist when the right or cause of action accrues, the statute does not begin to run until the party has survived them all.² If subsequent disabilities were to be regarded, a right of action might be saved for centuries, and the statute rendered incapable of accomplishing the important purposes for which it was created.³

§ 13. **Subsequent Disabilities Do Not Attach.**—It is a well settled rule of law that when the statute of limitations lawfully commences to run against the person or persons entitled to the possession of lands, the adverse possession of the occupant begins, and the progress of the statute is not arrested by any dévolution of ownership in the estate, or by any disability of the persons entitled to the possession occurring after the statute has begun to run.⁴

¹ *Demorest v. Wynkoop*, 3 Johns. 59 Pa. 297; *Wilson v. Betts*, 4 Denio Ch. (N. Y.) 129; *Riggs v. Fuller*, 54 (N. Y.), 201.

Ala. 149; *Cozzens v. Farnum*, 30 Ala. 149; *Dugan v. Gittings*, 3 Gill (Md.) 138; 43 Am. Dec. 315; *Demorest v. Nuttler v. De Rochemont*, 46 N. H. 81. *Wynkoop*, 3 Johns. Ch. (N. Y.) 129;

² *Jackson v. Johnson*, 5 Cow. 507; *see Thompson v. Smith*, 7 S. & R. (N. Y.) 74; 15 Am. Dec. 445; *Demorest* (Pa.) 210.

v. Wynkoop, 3 John. Ch. (N. Y.) 129; ⁴ *De Mill v. Moffott*, 49 Mich. 125; *Thorp v. Raymond*, 57 U. S. (16 13 N. W. Rep. 387 (1882); *Smith v. How.*) 247; *Weddle v. Robertson*, 6 Hill, 1 Wils. 134; *Cotterell v. Dutton*, Watts (Pa.), 486; *Henry v. Carson*, 4 Taunt. 826; *Rhodes v. Smithurst*,

§ 14. **When the Statute Begins to Run.**—The statute of limitations begins to run the moment the possession of the lands in question becomes adverse. This, of course, depends upon the ouster or disseizin of the real owner, and is sometimes, when the ouster is constructive, a difficult question to determine with certainty.¹

Illustrations.

Adverse possession will begin to run in favor of a purchaser at administrator's sale as against the heirs, as soon as he takes possession under his title, although the administration has not fully terminated. *Mitchell v. Campbell*, 19 Or. 198; 24 Pac. Rep. 455.

The owner of a tract of land divided it into thirty-nine lots of about five acres each, and sold part of them to the plaintiffs, in 1858. In 1867 he sold the remaining lots to the defendant, and assigned to him tax sale certificates against plaintiff's lots. The entire tract was then unclosed and unimproved. In the spring of 1867 the defendant had a surveyor run the exterior lines of the whole tract. He built a shanty, and cleared three acres around it, and made a brush fence along the south line of the tract. Prior to August 1, 1868, he cleared two acres more, and made a brush fence along the north and part of the east side, where it connected with a neighbor's fence. A lake on the west furnished a natural barrier on that side. The shanty and the clearing were on defendant's own lots. Prior to his entry there had been a traveled road through the tract, which the public continued to use during 1867 and 1868, and some subsequent years. Where the road crossed the brush fence the gaps were open a part of the time, and at other times they were closed by bars. In ejectment brought August 1, 1888, *held*, that there was evidence to support a finding that the adverse

4 Mees. & W. 42; 6 Mees. & W. 351; Moore, 2 Allen (Mass.), 306; *Carrier v. Eager v. Com.*, 4 Mass. 182; *Peck v. Gale*, 3 Allen (Mass.), 328; *Keil v. Randell*, 1 Johns. (N. Y.) 165; *Demorest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *Dillard v. Philson*, 5 Strobb. (S. C.) 213; *Byrd v. Byrd*, 28 Miss. 144; *Seawell v. Bunch*, 6 Jones, Law (N. C.), 197; *Tracy v. Atherton*, 36 Vt. 503; *Reimer v. Stuber*, 20 Pa. St. 458; *Stephens v. McCormick*, 5 Bush (Ky.), 181; *Ruff v. Bull*, 7 Harr. & J. (Md.) 14; *Pinckney v. Runage*, 31 N. J. Law, 21; *Lewis v. Barksdale*, 2 Brock (U. S. C. C.) 436; *Walden v. Gratz*, 1 Wheat. (U. S.) 292; *Mercer v. Selden*, 1 How. (U. S.) 87; *Hogan v. Kurtz*, 94 U. S. 773; *Beeker v. Van Valkenburgh*, 29 Barb. (N. Y.) 324; *Allis v.*

¹ Statutes of limitations only take place from the time the right of action accrues; and if there be fraud, from the time of its discovery. *Jones v. Conoway et al.*, Ex'rs, etc., 3 Yeates (Pa.), 109. "The court, very properly, charged that, if the sale was fraudulent, the act began to run against the devisees of Cornelius Murphy, or those who represented them, only from the time the fraud became known to the person then having title." *Gibson, J.*, in *Riddle v. Murphy*, 7 Serg. & R. (Pa.) 235.

possession of the defendant commenced prior to August 1, 1868. *Wood v. Springer*, 45 Minn. 299; 47 N. W. Rep. 811 (1891).

A, under verbal contract to purchase certain land, executed two notes therefor, and took possession October 28, 1868. The notes were never paid, and no deed was made. December 25, 1868, he conveyed the premises and possession to B. The latter died in 1870, and the land descended to his widow and daughter as sole heirs. In 1887 the grantor of A. died, leaving the land by will to plaintiffs, who sued in ejectment October 10, 1888. *Held*, that the possession did not become adverse until the date of B's taking possession, and defendants had not gained title by twenty years' prescription. *Timmons v. Kidwell* (Ill.), 27 N. E. Rep. 756; Am. Dig. 1891, 45.

A vendee of unoccupied lands who goes into possession under a contract to purchase is in privity with his vendor, and is entitled to have the time he held under the contract added to that after receiving his deed, in determining whether colorable title has matured into a perfect title by possession. *Brown v. Brown*, 106 N. C. 451; 11 S. E. Rep. 647.

Adverse possession by the grantee of a judgment debtor runs against the judgment creditor, who afterward obtains a sheriff's deed, from the time of the grant, and is not limited to the time when the sheriff's deed was given. *Garvin v. Garvin*, 31 S. C. 581; 10 S. E. Rep. 507 (1890).

One who purchases land by parol contract, receives possession, and afterward pays the purchase money, is presumed to have adverse possession from the date of payment; but the presumption may be overcome by showing a subsequent recognition of the vendor's title. *Newsome v. Snow* (Ala.), 8 So. Rep. 377; Am. Dig. 1891, 44.

Where the purchaser at a judicial sale has paid the price in full, but has not received a deed, and the heirs of the former owner at whose instance the sale was made, remain in possession, the statute of limitations does not begin to run against such purchaser until the heirs in possession distinctly assert a claim adverse to him. *Whitlock v. Johnson* (Va.), 12 S. E. Rep. 614; Am. Dig. 1891, 45.

Where a railroad takes possession of land bought, its possession becomes adverse to that of the seller upon the performance of the consideration, namely, the building of the spur track. *East Tennessee, V. & G. Ry. Co. v. Davis* (Ala.), 8 So. Rep. 349; Am. Dig. 1891, 44.

From the time a person obtains a patent from the State, the statute of limitations will run in favor of one in possession, and claiming adversely, against the patentee, and all claiming under him. *Wilhoit v. Tubbs*, 83 Cal. 279; 23 Pac. Rep. 386.

Where plaintiff's immediate grantor testifies that he at no time claimed title to the land, the time the land was owned by said grantor should be omitted from the computation of the time; and, as plaintiff himself had been in possession of the land for only two years, the predecessors of his immediate grantor must have had adverse possession for ten years to enable plaintiff to recover. *Brown v. Chicago, B. & K. C. Ry. Co.*, 101 Mo. 484; 14 S. W. Rep. 719 (1890).

As to public lands: The right of a holder of a certificate of purchase of land from the United States to maintain ejectment therefor in the Federal courts against a defendant in possession, ejectment being in those courts an action at law, accrues, so as to set the statute of limitations in motion against him, only when the patent is issued, as the legal title until that time

is in the United States, against whom the statute of limitations does not run, and the issue of the patent does not cause the plaintiff's legal title to relate back to the date of the certificate. *Redfield v. Parks*, 132 U. S. 239; 19 S. Ct. Rep. 83 (1890).

§ 15. **Adverse Possession and Prescription.**—A title to an incorporeal hereditament, or an easement, may be acquired, it is said, by prescription, or in other words, by an adverse user for the period required by the statute of limitations, and so the title to lands may be acquired by adverse possession. In this connection the term prescription signifies the manner of acquiring property, both corporeal and incorporeal, by an honest and uninterrupted use and enjoyment of the same for the period required by law. When the period has elapsed, the law raises the presumption of a grant in both cases, and denies to the original proprietor his remedy because he has allowed the period to elapse without asserting it.¹ The rules of law in relation to the acquirement of incorporeal property and rights may be less rigorous than those relating to the acquirement of lands, but it is not necessary to discuss them here.

§ 16. **The Doctrine of Presumption of Grants.**—In relation to the doctrine as to these presumptions, it is said there is no difference in the doctrine, whether the grant relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed, as a grant of a fishery, or of a common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession; they may, therefore, be encountered and rebutted by contrary presumptions, and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant. *A fortiori*, they

¹ Bouvier's Law Dictionary, Titles, Vinson, 33 Tex. 128; *Jones v. Jones*, Adverse Possession and Prescription; 18 Ala. 253; *Davis v. McArthur*, 78 see also *Humbert v. Trinity Church*, N. C. 357; *Melvin v. Waddell*, 75 24 Wend. (N. Y.) 614; *Winthrop v. N. C.* 361; *Elder v. Bradley*, 2 Sneed Auburn, 31 Me. 465; *Crispen v. Han-* (Tenn.), 253; *McElmoyle v. Cohen*, 13 navan, 50 Mo. 550; *Sailor v. Hert-* Pet. 312; *Bledso v. Little*, 5 Miss. 24, zogg, 2 Penn. St. 182; *Kinney v.*

can not arise where the claim is of such a nature as is at variance with the supposition of a grant. In general, it is the policy of courts of law, to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute does not apply. But where the statute applies, it constitutes, ordinarily, a sufficient title or defense, independently of any presumption of a grant, and, therefore, it is not generally resorted to. But if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other; and where the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant, within a period short of the statute of limitations.'

§ 17. An Occupant May Hold Adversely as to Some and Not as to Others.—A person occupying lands adversely, may admit that he does not hold them so as against certain persons, and such admission will not estop him from holding adversely as to others.²

Land was conveyed in 1854 in trust for a mother and her two children. On the death of the latter, their interests descended to three half-sisters and a daughter of a half-brother. The defendant is the husband of one of the half-sisters. In 1866, the mother deeded her interest to him, and the trustee conveyed him the legal title, both deeds being in trust for his wife and children. Since then he has held possession of the land. The complainants are the children of another of the half-sisters. The defendant held a power of attorney from her to transact her business in the State from the time he took possession until her death in 1867. In 1873, he bought the interests of the other half-sisters and that of the half-brother's daughter. *Held*, that during the life of the complainants' mother, the defendant's possession was not adverse to her. *Day v. Davis*, 64 Miss. 253; 8 So. Rep. 201 (1890).

Possession held in subordination to the title of the United States may be adverse as to another claimant. *Francoeur v. Newhouse*, 43 Fed. Rep. 236 (1890).

§ 18. Possession Can Not Be Adverse as to Persons Having no Present Right of Entry.—The person against whom an estate is claimed to be held in adverse possession must have an immediate right of entry or the possession as to him will not be adverse. For example, the estate of a tenant for life may be acquired by an adverse possession for the period required by the statute because the tenant has the right of

¹ *Story, J., in Ricard v. Williams*, 7 Wheat. (U. S.) 110 (1822). ² *Portis v. Hill*, 14 Tex. 69; 65 Am. Dec. 99; 1 Am. & Eng. Ency. 276.

entry.¹ But while the estate is held and acquired as against the tenant the possession is not adverse as to the remainder-man because, during the life estate, he has no right of entry. After the life estate is determined, however, the possession may become adverse as to the remainder-man, because he then has the right to bring his action for the recovery of the possession of the premises.²

§ 19. **It Does Not Run Against a Reversion or Remainder-man, When, etc.**—Statutes of limitation do not run against remainder-men or reversioners, during the continuance of the particular estate. These statutes are aimed at those who may be guilty of *laches* in omitting to enter or bring actions. Such *laches* and omissions can not be imputed to remainder-men or reversioners because they have no right in law either to enter into possession or bring an action. And this is true whether the particular estate exists at the time of the disseizin or when the adverse possession begins, or arises subsequently, provided, however, that in the latter case it is immediately preceded by a disability or disabilities within the proviso of the statutes.³

Illustrations.

As against a remainder-man: After defendant had held adverse possession, for the statutory period, of certain lands, the life tenant on whose estate plaintiff's remainder was limited executed to plaintiff a deed of all her interest in the land. *Held*, that the adverse possession had not only barred the remedy of the life tenant, but vested her estate in defendant, and therefore, the life tenant being still alive, plaintiff could not recover. Affirming 3 N. Y. S. 570. *Baker v. Oakwood*, 123 N. Y. 16; 25 N. E. Rep. 312 (1890).

Adverse possession commencing after the death of testator, whose will creates a remainder dependent on a life estate, will not bar an action by the remainder-men, commenced within the statutory period after the termination of the life estate. *Bleidorn v. Pilot Mountain Coal & Min. Co.* (Tenn.), 15 S. W. Rep. 737; Am. Dig. 1891, 43, 44.

One who holds land under a tenant for life acquires no title by prescription, as against those entitled in remainder, if they bring suit within seven

¹ *Moore v. Luce*, 29 Pa. St. 260.

74; *Higgins v. Crosby*, 40 Ill. 260;

² *Henderson v. Griffin*, 5 Pet. (U. S.) 151; *Bradstreet v. Huntington*, 5 Pet. (U. S.) 402; *Cheseldine v. Brewer*, 4 H. & McH. (Md.) 487; *Hall v. Vandergrift*, 3 Binn. (Pa.) 374; *Christie v. Gage*, 71 N. Y. 189; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390.

Woodson v. Smith, 1 Head (Tenn.), 276; *Bailey v. Woodbury*, 50 Vt. 166; *Bell v. McCauley*, 29 Ga. 355; *Foster v. Marshall*, 22 N. H. 491; *Gibson v. Jayne*, 37 Miss. 164; *Fogal v. Pirro*, 10 Bosw. 100; 17 Abb. Pr. 22.

³ *Jackson v. Johnson*, 5 Cow. (N. Y.)

years after the death of the tenant for life. *Bagley v. Kennedy*, 81 Ga. 721; 8 S. E. Rep. 742 (1889).

The title of a life tenant of land in the adverse possession of another, claiming the fee under a foreclosure sale, for the period required by the statute of limitations to bar an action therefor, during all which time the life tenant was under no disability, vests in the person in possession, and the life tenant has, after that time, no interest subject to grant. *Baker v. Oakwood*, 49 Hun, 416; 123 N. Y. 16; 3 N. Y. Sup. 570 (1889).

A daughter whose possession of her father's land was taken with his consent can not gain title thereby through the statute of limitations, as against the other heirs of the father. *Shaw v. Schoonover*, 130 Ill. 448; 22 N. E. Rep. 589 (1890).

One who enters under a deed, which he supposes conveys a fee, but which in fact only gives him an estate for the life of another, on the death of such other becomes the reversioner's tenant by sufferance, and can not set up the claim of adverse possession under the deed against the reversioner's grantee. *Learned v. Tallmadge*, 26 Barb. (N. Y.) 443.

After the daughter's death, her children had no right of entry or of action for the land until the death of the husband, and the termination of his estate by the curtesy, and before that time the statute of limitations did not run against them, and *laches* was not imputable to them; and, by platting a town on the land, the husband and his grantees could convey no greater interest than he possessed, and the possession of the streets by the corporation during his life was not adverse to the rights of the heirs. *Orthwein v. Thomas*, 127 Ill. 554; 21 N. E. Rep. 430 (1889).

Where the widow of a decedent holds lands belonging to his estate in trust for his heirs, and occupies the land solely by virtue of her marital rights, her possession is not adverse to the heirs so as to give title by limitation; especially where she has disavowed any other than a dower right. *Clayton v. Clayton's Ex'r* (Ky.), 12 S. W. Rep. 312; Am. Dig. 51.

The possession of grantees of a tenant for life is not, during the life of the grantor, adverse as against the reversioner, within the purview of the statute of limitations. *Rohn v. Harris*, 130 Ill. 525; 22 N. E. Rep. 587.

The possession of a vendee of a life tenant is not adverse to that of the reversioner during the life of the tenant for life, and until his death such possession is not sufficient to set the statute of limitations in motion, though such vendee claims to own the land in fee. *Mettler v. Miller*, 129 Ill. 630; 22 N. E. Rep. 529 (1890).

The fact that the married woman's act of Illinois, in 1861, removed all disabilities of the reversioner, did not set the statute of limitations in motion from that time. *Mettler v. Miller*, 129 Ill. 630; 22 N. E. Rep. 529 (1890).

§ 20. Adverse Possession as a Defense in Actions of Ejectment—Burden of Proof.—Where the defendant in possession of the premises for the recovery of the possession of which the action is brought, relies upon the statute of limitations as a defense, the burden of proof is upon him to show that his possession has been intentionally adverse, hostile, open and ex-

clusive during the full period required by the statute immediately preceding the commencement of the action.¹

§ 21. **Discussion of the Question of Adverse Possession as a Defense.**—In testing the defense of adverse possession, the courts direct their attention to the time during which it has continued, and its character, its notoriety, the nature of the occupation, and the intention with which it was begun and continued. If it be a naked possession, not accompanied with any claim of right, it must fail as a defense, for it can never constitute a bar, but must, under the law, inure to the advantage of the real owner as a possession in his right and for his benefit. The law presumes, till the contrary is shown, that a man in possession without title is holding for the true owner; and that he intends to hold honestly so far as he can consistently with holding at all. It is a general rule of law that every possession of land has the presumption of right in its favor, but this presumption may be overcome by proof; but, until it is overcome, the possession is adverse to any other claimant. The presumption which the law raises in favor of the actual occupant may be destroyed by showing that his possession has been interrupted, as, for example, by proof of his having received a lease, or evidence of his having paid rent, or acknowledged in some other way the title of the real owner, or it may be destroyed by showing that the defendant entered upon the lands in controversy without pretending to any claim or right whatever; in which case the possession is in subservience to the legal owner. Hence a claim of right is necessary, not because the statute always requires it, but because the want of such claim is evidence sufficient to destroy the legal presumption of right. The real intention with which a possession is taken or held, is the true test of its character. To be adverse it must be shown to have been hostile in its inception, or that, having been begun in consistency with the rightful title, its character has changed; but adequate cause must be shown for the change. Where it commences under an acknowledgment of the title of the rightful owner, the possession will retain such quality through any succession of occupants of the land, and will be presumed to be in subservience to the rightful owner. The

¹ Village, etc., v. Reed, 21 Neb. 261; 31 N. W. Rep. 797 (1887).

strictest proof of hostile inception of the possession is required. As to supervening changes of possession, they must be proved by an accession of another title, or other circumstances furnishing a motive for exclusive claim. But every possession is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute of limitations, which is not in subservience to the title of another, either by a direct acknowledgment in some way or an open or tacit disavowal of right on the part of the occupant. It is in the latter case only that the law adjudges the possession of one to the benefit of another.¹

§ 22. **Not a Defense Against Public Rights.**—No *laches* is to be imputed to the government and no time runs against it so as to bar the public rights. By the ancient rule of the common law, time does not run against the State.² It is a matter of common knowledge that statutes of limitation do not run against the State. That no *laches* can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy; that as he was occupied with the cares of government, he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments which must necessarily act through numerous agents, and is essential to a preservation of the interest and property of the public. It is upon this principle that in this country the statutes of a State prescribing periods within which rights must be prosecuted, are not held to embrace the State itself, unless it

¹ United States v. Arredondo, 6 Pet. 1 H. & M. C. H. (Md.) 151; Gittens (U. S.) 743; Clark v. Courtney, 5 Ib. v. Lowry, 15 Ga. 336; Jackson v. 354; Bradstreet v. Huntington, Ib. Potter, 1 Paine (C. C. U. S.), 457; 402; McIver v. Rogan, 2 Wheat. (U. Markley v. Amos, 2 Bailey (S. C.), S.) 29; Kirk v. Smith, 9 Ib. 141, 288; 603; Ray v. Barker, 1 B. Mon. (Ky.) La Frombois v. Jackson, 8 Cow. (N. 364; Moore v. Moore, 8 Shepley (Me.), Y.) 589; Read v. Thompson, 5 Barr. 350; Lamb v. Foss, Ib. 240; Millay v. (Penn.) 103; Dikeman v. Parrish, 6 Millay, 6 Ib. 387; Hamilton v. Paine, Ib. 110; Hall v. Stephens, 9 Met. 5 Ib. 210. (Mass.) 418; Moore v. Johnston, 2 ² Armstrong v. Morrill, 81 U. S. Spear (S. C.), 288; Rogers v. Hill- (14 Wall.) 120 (1871); Stoughton v. house, 3 Conn. 403; Borrets v. Turner, Baker, 4 Mass. 526; U. S. v. Hoar, 2 2 Hayward, 114; Armour v. White, Mass. 312; Lindsey v. Miller, 6 Pet. Ib. 69; Grant v. Winborne, Ib. 57; (U. S.) 673; Gibson v. Chouteau, 80 Anonymous, Ib. 134; Hatch v. Hatch, U. S. (13 Wall.) 92 (1871). Ib. 34; Tasker's Lessee v. Whittington,

is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes.¹

Illustrations.

Against municipal corporation: Limitation does not run against a municipal corporation in respect to streets and alleys dedicated to public use, and no title can be acquired by adverse possession of land so dedicated, although the street has never been opened, or used by the public. *Giffen v. City of Olathe* (Kan.), 24 Pac. Rep. 470 (1890).

Act Cal. March 26, 1851, which grants the use of certain beach and water lots to the city of San Francisco for ninety-nine years, with a proviso that the city shall pay into the State treasury, within twenty days after their receipt, 25 per cent. of all moneys arising from the sale of the property, does not create a trust in the city in favor of the State, so far as the land itself is concerned; and hence the city's title to such land is subject to extinguishment by adverse possession under the statute of limitations. Following *Holladay v. Frisbie*, 15 Cal. 631; *City and County of San Francisco v. Straut*, 84 Cal. 124; 24 Pac. Rep. 814 (1890).

Against the public: Land purchased by a county, on which is erected a hospital, as provided by Pol. Code Cal. § 4046, subd. 9, authorizing counties to build hospitals and "other public buildings," is dedicated to a public use, though under the succeeding subdivision the land may be sold; and the statute does not run in favor of one taking possession of such land. *Yolo County v. Barney*, 79 Cal. 375; 21 Pac. Rep. 833 (1889).

Plaintiff sued to restrain a city from removing, as an obstruction, without compensation, a certain building erected six years before the dedication of the street on which it was situated, alleging that he had claimed title to, and had been in adverse possession of the building and the land on which it was situated for more than thirty years before suit. Defendant contested under Rev. St. Mo. § 3227, which provides that nothing contained in any statute of limitation shall extend to any lands appropriated to any public use. *Held*, that this statute is prospective, and does not apply to cases where right of entry accrued before it was enacted. *Black, J.*, dissenting. *Connecticut Mut. Life Ins. Co. v. City of St. Louis*, 98 Mo. 422; 11 S. W. Rep. 969 (1889).

Public lands: Under the law of Spain and Mexico, mere possession, however long continued, of any portion of the public domain, under an instrument which did not purport to transfer the property, did not create a title which would enable the possessor to hold the land against the Spanish crown or against the Mexican government. *Harrison v. Ulrichs*, 39 Fed. Rep. 654.

Plaintiff entered public lands under a military land warrant in 1857. By mistake a patent was issued to him to another tract, which was canceled.

¹ *Doe v. ex dem., etc., v. Johnson*, (1871); *U. S. v. Hoar*, 2 Mass. 312; 92 U. S. (2 Otto), 343 (1875); *Gibson v. People v. Gilbert*, 18 Johns. (N. Y.) v. Chouteau, 80 U. S. (13 Wall.) 92 228.

In 1884 plaintiff obtained a patent under the original entry. *Held*, that the patent did not relate back to the original entry, and the statute of limitations did not begin to run in favor of one in adverse possession of the land until the patent issued in 1884. *Churchill v. Sowards*, 78 Iowa, 472; 43 N. W. Rep. 271.

The statute of limitations begins to run against one who claims public lands as grantee of the United States in favor of one in possession, claiming to have acquired the title thus acquired by the grantee, from the date of the grantee's certificate of final proof and payment. *Steele v. Boley* (Utah), 22 Pac. Rep. 311; Am. Dig. 1889, 2357.

§ 23. Adverse Possession as an Affirmative Right.—It is well settled that adverse possession for the period fixed by law is not a right of defense merely; but it is for all practical purposes a title, and affirmative remedies may be had upon it even against the original owner, should he, after the possession becomes complete, succeed in obtaining the possession.¹ After an adverse possession has ripened into a title the occupant becomes thereby vested with the absolute title to the premises, and he may maintain his suit in equity to remove clouds and quiet his title if necessary.²

The plaintiffs having been in the open, notorious, exclusive, continuous, adverse possession of the real estate in controversy for more than ten years as owners, they thereby became vested of the absolute title to the premises. *Peterson v. Townsend* (Neb.), 46 N. W. Rep. 526 (1890); Am. Dig. 1891, 55.

Where a purchaser of land, believing he has a good title, tells one who is in possession that he has bought the land, and demands possession, which is given without protest, and he thereafter continues in peaceable possession for more than five years, such possession is adverse, and he thereby acquires a title which he may have quieted in an action against the party in possession at the time of his purchase. *McCormack v. Silsby*, 82 Cal. 72; 22 Pac. Rep. 874 (1890).

Where the evidence, in an action to quiet title, shows that plaintiff entered into possession under an oral contract of division with defendant, and has remained in exclusive and adverse possession for over ten years, a decree quieting his title is proper. *Quinn v. Quinn*, 76 Iowa, 565; 41 N. W. Rep. 316 (1889).

Where a widow, holding a life estate in lands by right of dower, purchases the reversion at administrator's sale, and the price is used to pay

¹ *Bunce v. Bidwell*, 43 Mich. 542; 5 N. W. Rep. 1023 (1880); *Brent v. Chapman*, 5 Cranch (U. S.), 358; *Lefingwell v. Warren*, 2 Black (U. S.), 599; *Jackson v. Dieffendorf*, 3 Johns. (N. Y.) 269; *Reed v. Farr*, 35 N. Y. 113; *Reformed Church v. Schoolcraft*, 65 N. Y. 134; *Moore v. Luce*, 29 Pa. St. 260.

² After an adverse possession has ripened into a title, the original owner can not by taking possession, and then deeding the land to a third person, convey to the latter any better right than he himself has. *Faloon v. Simshauser*, 130 Ill. 149; 22 N. E. Rep. 815 (1889).

debts of the decedent, even though the sale is irregular and void, the widow obtains an equitable title to the fee, which ripens into a legal title, by adverse possession by her and her grantees for more than twenty years, though the heirs of the decedent could not sue at law for the land during the widow's life, as they could have sued in equity to remove her claim under the administrator's sale as a cloud on their title. *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; 6 So. Rep. 197 (1889).

§ 24. **Who May Question a Title by Adverse Possession.**—There is no possible ground upon which a plaintiff's title by adverse possession can be questioned by the defendant, who occupies the attitude of a mere subsequent intruder without any title. The fact that he purchased the same from persons who also had no title in no way fortifies his position.¹

§ 25. **A Question of Law and Fact.**—The question as to what facts or circumstances will constitute adverse possession is a question of law for the court, and the question as to the existence of such facts in a given case is for the determination of the jury.²

§ 26. **Who May Hold Adversely.**—Any person, natural or artificial, who can hold real estate, can of course take and hold adversely. The rule as regards natural persons seems to be subject to no special objections other than those hereinbefore discussed, but with artificial persons, corporations, the law is not so well settled.³

§ 27. **Domestic Corporations.**—Domestic corporations, as considered in this section, are those existing within the jurisdiction under the laws of which they derive their existence and powers. When they are empowered by the laws creating

¹ *Mayor, etc., v. Carleton*, 22 Jones 17 Min. 361; *Boogher v. Neese*, 75 & S. (N. Y.) 555; 113 N. Y. 284; 21 N. Mo. 384; *Holleday v. Cromwell*, 37 E. Rep. 55; *Gardner v. Heart*, 1 N. Y. Tex. 437; *Magee v. Magee*, 37 Miss. 528; *Miller v. Railroad Co.*, 71 N. Y. 490; *Beverly v. Burke*, 9 Ga. 440; 54 Am. Dec. 351; *Bracken v. Martin*, 3

² *Gross v. Welwood*, 90 N. Y. 638; *Yerg. (Tenn.)* 55; *Bolling v. Peters-*
Trim v. Marsh, 54 N. Y. 599; 13 Am. burg, 3 Rand. (Va.) 536; *Kinsel v.*
Rep. 623; *Den v. Sinnickson*, 9 N. J. Daggett, 11 Me. 309; *Webb v. Rich-*
L. 149; *Bell v. Hurtley*, 4 W. & S. ardson, 42 Vt. 465; *Gayetty v. Be-*
(Pa.) 132; *Reed v. Goodyear*, 17 S. & thune, 14 Mass. 49. Upon admitted or
R. (Pa.) 350; *Workman v. Guthrie*, 29 undisputed facts, the court may de-
Pa. St. 495; *Baker v. Swan*, 32 Md. cide the question of title by prescrip-
355; *McClurry v. Ross*, 5 Wheat. tion as matter of law. *Verdery v.*
(U. S.) 116; *Wriggins v. Holley*, 11 Savannah, F. & W. Ry. Co., 82 Ga.
Ind. 2; *Shackleford v. Baily*, 35 675; 9 S. E. Rep. 1133.
Ill. 387; *McPherson v. Featherston*,
37 Wis. 632; *Washburn v. Cutter*,

³ See Sections 27, 28, 29 and notes.

them to hold real estate, there can be no question as to their right to acquire title to the same by adverse possession.

By a religious corporation: Trinity Church, in 1705, entered into possession of a farm, under a patent or deed professing to convey the whole farm, and continued in possession, claiming the entire title, for sixty years; *held*, a conclusive bar against all persons, however valid their title in 1705. *Bogardus v. Trinity Church*, 4 Sand. Ch. (N. Y.) 633.

By cemetery company: Where a cemetery company, organized in perpetuity, takes possession of land under a deed of warranty of the whole title, though in fact there was an outstanding undivided interest in another person, and follows this up by inclosing the land, and devoting it to the burial of the dead, this is such possession as will constitute an ouster of the owner of such undivided interest. Affirming 3 N. Y. S. 570. *Baker v. Oakwood*, 123 N. Y. 16; 49 Hun (N. Y.), 416; 25 N. E. Rep. 312 (1890).

By a city: Occupation of land by the city of New York, under condemnation proceedings and claim of ownership, for more than twenty years, gives it a complete title by adverse possession. *City of New York v. Carleton*, 113 N. Y. 284; 21 N. E. Rep. 55 (1889).

But not of levees and streets: No one can acquire by prescription a right against the public to levees, streets and highways over the *batture*. *Louisiana Ice Manuf'g Co. v. City of New Orleans*, 43 La. Ann. 217; 9 So. Rep. 21 (1891).

The New York Elevated Railroad Company and its predecessors in title having acquired the right to construct and operate its railroad in Greenwich street, in New York city, under lawful warrant from the public authorities, on condition that compensation be made to abutting owners, its enjoyment of any part of the street was not adverse to the abutting owners, but under a license, and an entry thereunder must be presumed to have been in subordination to their rights. Hence a right by prescription can not be based upon such occupation and user. *American Bank-Note Co. v. New York El. R. Co.*, 13 N. Y. Sup. 626; Am. Dig. 1891, 54.

Right of way of railroad corporation—Tacking: Where the right of way of a railroad company expires with the life of the corporation, and the original company was dissolved by merger into a new company, which has operated the road for more than twenty years, the new company acquires the right of way by adverse possession and user. Affirming 46 Hun, 612. *Miner v. New York Cent. & H. R. R. Co.*, 123 N. Y. 242; 25 N. E. Rep. 339 (1890).

§ 28. **Foreign Corporations.**—In some States the statutes of limitation are held not to run against a citizen in favor of a foreign corporation or its grantees. Hence it would seem that in those States foreign corporations can not avail themselves of the doctrine of adverse possession as a defense in suits of ejectment.¹

¹ *Union C. S. Min. Co. v. Taylor*, *Barstow v. Silver M. Co.*, 10 Nev. 100 U. S. (10 Otto) 37 (1879); *Robin-son v. Silver M. Co.*, 5 Nev. 44; 67 Ill. 568 (1873).

§ 29. **Municipal Corporations.**—The decisions upon the question as to whether a municipal corporation can acquire title to real estate by adverse possession are by no means harmonious, but the weight of authority seems to favor the doctrine that they can.¹

§ 30. **What Can Be Held Adversely.**—As a general rule any real property for the recovery of which an action of ejectment will lie, may be held adversely, and any interest in lands for which the action will not lie can not.²

§ 31. **Easements.**—We have seen that an action of ejectment will not lie for the recovery of a mere easement because it is a servitude and not an estate in lands, and hence it must follow that an easement can not be acquired by adverse possession because it is incapable of actual possession, though it may be acquired by prescription, by which is meant an uninterrupted use as an easement for the period required by law.³ The remedy for an interruption of the use of an easement after it is so acquired, is found in an injunction, or in an action of

¹ *In favor of the right:* Manchester Mills v. Town, etc., 25 Gratt. (Va.) 825; Wheeling v. Campbell, 12 W. Va. 66; Varick v. New York, 4 Johns. (N. Y.) 53; Sherman v. Kane, 86 N. Y. 57; Sidefield v. Wilmott, 2 Root (Conn.), 288; Beardslie v. French, 7 Conn. 185; City of Richmond v. Poe, 24 Gratt. (Va.) 149; Levasser v. Washburn, 11 Gratt. (Va.) 572; City of Galveston v. Menard, 23 Tex. 349; Clements v. Anderson, 46 Miss. 581; State v. Pettis, 7 Pick. (S. C.) 390; Armstrong v. Dalton, 4 Dev. (N. C.) 368; School Directors, etc., v. Georges, 50 Mo. 194; Alsin v. Town of Henderson, 16 B. Mon. 131; Lake v. Kennedy, 13 Ohio St. 42; Chicago R. I. & P. R. Co. v. Joliet, 79 Ill. 40; Burlington v. Railroad Co., 41 Iowa, 134. *Against the right:* Erem v. Erie Co., 66 Pa. St. 222; Jersey City v. State, 30 N. J. L. 521; Cross v. Mayor, 18 N. J. Eq. 311; Simmons v. Cornell, 1 R. I. 519; Sims v. City of Frankfort, 79 Ind. 446; Scheveport v. Walpole, 22 La. Ann. 526.

² Blake v. Hepburne, 2 Yeates (Penn.), 331; Farley v. Craig, 3 Green (N. J.), 192; Jackson v. May, 16 Johns. (N. Y.) 184; Doe v. Alderson, 1 M. & W. 210; Crocker v. Fothergill, 2 B. & Ald. 652; Nichols v. Lewis, 15 Conn. 137; Jackson v. Buel, 9 Johns. (N. Y.) 298; Nichols v. Lewis, 15 Conn. 137; Woodhull v. Rosenthal, 61 N. Y. 382; Child v. Chappell, 9 N. Y. 246; 3 Black. Com., 206; Rowan v. Kelsey, 18 Barb. (N. Y.) 484; 3 Bacon Abr. 272, Eject. D.; 2 Black. Com., 17.

³ Morgan v. Moore, 3 Gray (Mass.), 319; Nellis v. Munson, 24 Hun (N. Y.), 575; San Francisco v. Caldworwood, 31 Calif. 585; First Bap. Soc. v. Grant, 59 Me. 245; 66 Me. 400; Snyder v. Warford, 11 Mo. 513; Hewlins v. Shippam, 5 B. & C. 221. Title to an oyster bed can not be acquired by user alone, however long continued. People v. Lowndes, 55 Hun, 469; 8 N. Y. Sup. 908 (1890).

trespass on the case, according to the circumstances of each particular case, and not in an action of ejectment.¹ A person may acquire an easement in land by an uninterrupted user, without having possession of the land upon which it is a servitude. If he is in possession of the land he may, by adverse possession, acquire the title in fee, in which case the easement, so far as the adverse holder is concerned, is extinguished.

§ 32. **Water-courses, etc.**—The use of water appears to be something more than a mere easement, and may be acquired by adverse possession. But it is otherwise with a mere claim of a right to the use and enjoyment of water.²

Defendant may plead adverse possession of a ditch appurtenant to his land, and running through plaintiff's land, though defendant has never paid any taxes assessed against plaintiff's land (which did not appear to have been taxed any higher on account of such ditch), but has always paid the taxes on his own land, whose value was enhanced by the water from the ditch. *Coonrad v. Hill*, 79 Cal. 587; 21 Pac. Rep. 1099 (1889).*

So far as the defense of adverse possession or of equitable estoppel is concerned, it is immaterial whether or not the waters of a natural stream which fed the ditch were appropriated in compliance with the statute as to posting notices, etc. *Coonrad v. Hill*, 79 Cal. 587; 21 Pac. Rep. 1099 (1889).

§ 33. **Adverse Possession—Its Essential Elements.**—Possession, to be effectual, either to prevent a recovery or vest a right under the statute of limitations, must be an actual possession attended with a manifest intention to hold and continue it. It must be, in the language of the authorities, an actual, continued, hostile or adverse, visible, notorious and exclusive possession for the space of time required by the statute. It need not be continued by the same person; but when held by different persons, it must be shown that a privity existed between them;³ to be effectual as a defense this possession must

¹ *Dothard v. Denson*, 75 Ala. 482; (20 How.) 29 (1857); *Cook v. Babcock*, Allen v. Ormond, 8 East, 4; *Cushing* 11 Cush. (Mass.) 209; *Creekmur v. v. Adams*, 18 Pick. (Mass.) 110; *Hastings v. Livermore*, 7 Gray (Mass.), Noel, 42 Ohio St. 18; 51 Am. Rep. 194; *Northern Turnpike Co. v. Smith*, 788; *Flaharty v. McCormick*, 113 Ill. 15 Barb. (N. Y.) 355; *The Seneca* 538; *Washburn v. Cutter*, 17 Minn. Road Co. v. A. & R. R. Co., 5 361; *Dorie v. Bowmar*, 55 Miss. 671; *Hill* (N. Y.), 170. *Ringo v. Woodruff*, 43 Ark. 469;

² *Angell & Ames on Water-courses*, Bracken v. Jones, 63 Tex. 184; §§ 208, 219; *Cox v. Clough*, 70 Calif. School Dist. etc., v. Benson, 52 Am. 345; 11 Pac. Rep. 732. Dec. 618; *Unger v. Mooney*, 63 Cal.

³ *Wheeler v. Moody*, 9 Tex. 372; 586; *Hawk v. Senseman*, 6 S. & R. Boswell v. De La Lanzo, 61 U. S. (Pa.) 21; *Parch v. Spooner*, 57 Vt.

not only be actual, open and continuous, but it must be accompanied by an intention on the part of the person claiming to hold the land in question as the owner. It must be in all cases under a claim of ownership. No matter how exclusive and hostile to the real owner in appearance the possession claimed as adverse may be, it can not be effectually adverse unless accompanied by an intention on the part of the person claiming to make it so.¹ A naked possession, unaccompanied with any claim of right, will never constitute a bar to an action for the recovery of the lands, but will inure to the advantage of the real owner. It is the intention which effects the character of the entry and possession.² The statute runs only in favor of parties in possession claiming title adverse to the whole world.³

§ 34. **Intention an Essential Element.**—Adverse possession depends upon the intention with which it is taken and held. In other words, no matter how exclusive to the real owner the possession in question may in fact or in appearance be, it can not amount to an adverse possession under the statutes of limitation unless it is taken and held with the interest on the part of the holder to make it so.⁴

An action for the possession of land will not be barred by an occupancy by defendant for more than twenty years before the commencement of the suit, if defendant did not during that time dispute the title of plaintiff, or

583; Davenport v. Sebring, 52 Iowa, 366; Jackson v. Wheat, 18 Johns. (N. Y.) 44; La Frombois v. Jackson, 8 Cow. (N. Y.) 609; Grant v. Fowler, 39 N. H. 104; Root v. McFerrin, 37 Miss. 51; Stamper v. Griffin, 20 Ga. 321.

¹ Calvin v. Rep. Val. Land Ass'n, 23 Neb. 75; 36 N. W. Rep. 361 (1888).

² Ewing v. Burnett, 11 Pet. (U. S.) 41; McCracken v. City St. F., 16 Calif. 365.

³ Jackson v. Parker, 3 Johns. Cas. (N. Y.) 124; Thompson v. Pioche, 44 Calif. 508; Calvin v. Rep. Val. Ld. Ass'n, 23 Neb. 75; 36 N. W. Rep. 361; Campaugh v. Lafferty, 50 Mich. 114; 15 N. W. Rep. 40; Greenhill v. Briggs (Ky.), 2 S. W. Rep. 774.

⁴ Worcester v. Lord, 56 Me. 265;

Dow v. McKenney, 64 Me. 138; Morse v. Churchill, 41 Vt. 649; Jackson v. Thompson, 16 Johns. (N. Y.) 293; Russell v. Davis, 38 Conn. 562; McGee v. Morgan, 1 A. K. Marsh. (Ky.) 62; Ewing v. Burnett, 11 Pet. (U. S.) 41; Jackson v. Porter, 1 Paine (U. S.), 457; Allen v. Holton, 20 Pick. (Mass.) 458; Green v. Harman, 4 Dev. (N. C.) 158; Humphreys v. Hoffman, 33 Ohio St. 395; McNamara v. Seaton, 92 Ill. 498; Grube v. Wells, 34 Iowa, 148; Music v. Barney, 49 Mo. 458; Wattmeyer v. Baughman, 63 Md. 200; Core v. Tanel, 24 W. Va. 238; Davis v. Bowman, 55 Miss. 671; Brown v. Cockrell, 33 Ala. 45; Hawood v. Rudy, 29 Ga. 154; St. Louis University v. McCune, 28 Mo. 481.

claim any title in himself. *Maple v. Stevenson*, 122 Ind. 368; 23 N. E. Rep. 854 (1890).

Defendant introduced evidence to show that she had settled upon the land in controversy upon the promise of a former owner that she might have it for her own; and that she had continued in actual, open, and notorious possession for ten years. *Held*, that an instruction that, if the jury found the facts as defendant claimed, then they should find for defendant, notwithstanding they might believe plaintiff's evidence that while defendant was in possession, she had expressed a willingness to pay the owner a sum of money for it, was error. *Liggett v. Morgan*, 98 Mo. 39; 11 S. W. Rep. 241 (1889).

Real estate was conveyed in trust to the sole use of a married woman and her heirs by her husband, the defendant. The wife died, leaving a daughter. Defendant remained on the premises with the daughter, who married, each paying part of the expenses of housekeeping for three years, when the daughter died, and her husband continued to live on the premises five years without paying board. *Held*, that the possession of defendant, with the daughter and afterward with her husband, did not bar a recovery of the premises in an action by the husband and heirs of the daughter, there being nothing to show that such possession was adverse. *Spencer v. O'Neill*, 100 Mo. 49; 12 S. W. Rep. 1054 (1890).

Where title is claimed by adverse possession, if the possession is by actual occupation of the possessor under claim of title, it is visible, open, notorious, distinct, and will be presumed to be hostile. *Green v. Anglemire*, 77 Mich. 168; 43 N. W. Rep. 772 (1889).

§ 35. Actual Possession as an Element of an Adverse Holding.—We have seen that one of the essential elements of an adverse possession is, that it be actual and real, a holding existing in acts, as distinguished from a speculative or constructive occupancy.¹ The dominion and enjoyment which constitutes actual possession in law must be absolute. It may be under color of title or as a mere intruder without color of title.²

§ 36. What Constitutes an Actual Possession in Law.—The law does not regard as necessary any particular use to be

¹ *State v. Wells*, 31 Conn. 210.

Jones, 63 Tex. 184; *Eagle, etc., Co. v.*

² *Holtzapfel v. Phillibaum*, 4 Wash. Bank, 55 Ga. 44; *Huntington v. Allen*, 44 Miss. 654; *Malloy v. Bowden*, Calif. 586; 49 Am. Rep. 100; *Pepper*, 86 N. C. 251; *Pegues v. Warley*, S. C. v. O'Dowd, 39 Wis. 548; *Peterson v.* 180; *Core v. Faupel*, 24 W. Va. 238; *McCullough*, 50 Ind. 35; *Washburn v. Beatty v. Mason*, 30 Md. 409; *Bear Cutter*, 17 Minn. 361; *Sparrow v. Hovey*, 44 Mich. 63; *Ambrose v. Roley*, 72; *Ogden v. Jennings*, 66 Barb. (N. 58 Ill. 506; *Booth v. Small*, 25 Iowa, Y.) 301; 62 N. Y. 526; *Huntington v.* 177; *Horboch v. Miller*, 4 Neb. 31; *Wholey*, 29 Conn. 391; *Cook v. BabBradley v. West*, 60 Mo. 33; *Ringo v. cock*, 11 Cush. (Mass.) 209; *Jewell v. Woodruff*, 43 Ark. 469; *Bracken v. Hussey*, 70 Me. 433.

made of the land to render the possession actual. Such matters must depend largely upon the nature of the land and the uses to which it is adapted by nature. Any visible and notorious acts, such as cultivation, residence, occupation, fencing and inclosing the same, and the like, will, in general, be sufficient to establish the fact of adverse possession.¹ What constitutes an actual possession must, of course, be governed by the facts of each particular case.²

Illustrations.

Acts of ownership, etc.: Where a part of a single uninclosed tract is sold, and the grantee fails to pay the purchase price, and abandons possession and claim of right, the grantor's possession of the remainder of the tract, and his exercise of acts of ownership over the part sold, are constructive possession of that part, under Rev. St. Mo. 1879, § 3223, providing that the possession of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising the usual acts of ownership over the whole tract, shall be deemed a possession of the whole. *Hickman v. Link*, 97 Mo. 482; 10 S. W. Rep. 600 (1890).

It is competent to show that before the grantee abandoned possession, suits were prosecuted against both him and the grantee to recover the land, as showing a cause and reason for his abandonment, and refusal to pay the purchase price. *Id.*

The grantor's defense of possession, and assertion of title to the whole tract, in a suit by third persons claiming a superior title, is a sufficient act of ownership where the property is in a state of nature. *Id.*

The record of the suit in which the plaintiffs were nonsuited, while not color of title, is admissible to prove the required act of ownership. *Id.*

Where land has been inclosed as a burial ground, and acquiesced in by defendant and his predecessors for more than a century, under a claim supported by a grant, and plaintiff has had such *quasi* possession as is usual in such cases, viz., the occasional exercise of the right of burial, the boundaries, as so located, can not be questioned. *Town of Southampton v. Post*, 51 Hun, 643; 4 N. Y. Sup. 75 (1890).

Cutting ice on a pond and occupying a part of the surface with men and horses for this purpose during a few weeks of every winter, is not sufficient

¹ *Ewing v. Burnett*, 11 Pet. (U. S.) Judd, 81 Ill. 488; *Clement v. Perry*, 41; *Brumagin v. Bradshaw*, 39 Calif. 34 Iowa, 567; *Read v. Allen*, 63 Tex. 24; *Bowen v. Guild*, 130 Mass. 121; 154: *Door v. School Dist.*, 40 Ark. Finly v. Cook, 54 Brad. (N. Y.) 9; 243; *Bailey v. Carleton*, 12 N. H. Core v. Faupel, 24 W. Va. 238; 9; 37 Am. Dec. 190; *Taught v. Humphreys v. Huffman*, 33 Ohio St. way, 50 Me. 24. 403; *Bell v. Denson*, 56 Ala. 444; ² *Leeper v. Baker*, 68 Mo. 405; *Ford McMullin v. Erwin*, 58 Ga. 427; *Lee v. Wilson*, 35 Miss. 505. *per v. Baker*, 68 Mo. 407; *Martin v.*

possession or occupation to constitute an adverse possession, which will, in twenty years, ripen into a title. *Gouverneur v. National Ice Co.*, 57 Hun, 474; 11 N. Y. Sup. 87 (1890).

An annual entry for a short time on uninclosed wild land to cut natural grass on part of it will not, of itself, work disseizin of the owner, and create adverse possession against him. *Bazille v. Murray*, 40 Minn. 48; 41 N. W. Rep. 238 (1889).

Where, on partition of the land of a decedent, a strip of land of which he had neither title nor possession is included in one of the purparts, the fact that the purchaser of such purpart, while living within the lines of the decedent's land, cuts timber from time to time on such strip, does not give him adverse possession thereof. *Olewine v. Messmore*, 128 Pa. St. 470; 18 Atl. Rep. 495.

That defendant, under color of title, entered upon platted village lots covered with underbrush, cut, grubbed, and burned the growth so as to completely clear the land, and paid taxes thereon, is sufficient to sustain a finding of disseizin and adverse possession. *Costello v. Edson*, 44 Minn. 135; 46 N. W. Rep. 299 (1890).

Digging away some of the soil and piling railroad ties on land, when not done under claim of ownership nor by the possessor of a paper title, does not constitute adverse possession, within the meaning of the statute of limitations. *Chicago & N. W. Ry. Co. v. Galt*, 133 Ill. 657; 23 N. E. Rep. 425 (1890).

Actual dispossession of defendant is not necessary to bar the running of the statute, and an agreement that defendant delivers possession to plaintiff, or consent to abide the judgment for possession, is equivalent to dispossession, and thereupon defendant becomes the tenant of plaintiff, and his possession is no longer adverse. *Mabary v. Dollarhide*, 98 Mo. 198; 11 S.W. Rep. 611 (1889).

Where one has made a survey of lands, for the purpose of pre-emption, which includes a prior survey by another person, his possession of that part of his survey outside of the former survey will not have the effect of extending such possession within the former survey, though there is no one in actual possession of it. *King v. Hunt* (Ky.), 13 S. W. Rep. 214; Am. Dig. 1890, 37.

Where the person claiming title to land did not reside on it, but frequently visited her son, who did live there, and there was constant communication between them, it can not be held that the son's possession was adverse. *Dunham v. Townshend*, 118 N. Y. 281; 23 N. E. Rep. 367 (1890).

§ 37. The Possession, How Held—Tenants, Agents, etc.
—In this as well as other cases resting upon the familiar principle—whatever a person does by his agents or servants, he does by himself, it is not necessary to show an actual occupancy by a defendant claiming in adverse possession under the statute; it may be by his tenants, agents or servants.¹

¹ *Elliott v. Dycke*, 78 Ala. 150.

§ 38. **What Acts of Occupancy are Sufficient.**—In the absence of statutory enactments prescribing what manner of occupancy is necessary to constitute an adverse possession, such acts as residence upon and cultivation of the lands in question are not in general necessary, especially when the nature of the premises will not admit of it. But in these cases the claim of the party holding the possession must be made apparent by some public acts consistent with his ownership and the notice or use of the lands.¹

§ 39. **Occupation of Land for Mining and Quarrying Purposes.**—This principle is well illustrated by the occupancy of land for mining and quarrying purposes, as sufficient to constitute an adverse possession. Although mining and quarrying are less general, but still frequent and important industries, and entitled to the same protection under the law as agriculture, it is no longer an open question that these operations may constitute adverse possession the same as the cultivation of the soil.² Where the holding is under a paper title the geographical extent of the possession, it seems, must be governed by the description contained in the paper title.³

§ 40. **What Acts of Occupancy Have Been Held Sufficient to Constitute an Adverse Possession.**—Cultivating or using the land in the ordinary way,⁴ fencing and continual use of the land by a claimant not residing upon it,⁵ and other acts of like character, have been held sufficient to constitute an adverse possession.

§ 41. **What Acts Have Been Held Not Sufficient.**—Occasional trespasses by persons avowing an intention to make an adverse claim;⁶ disconnected trespasses, such as cutting tim-

¹ Ewing v. Burnett, 11 Pet. (U. S.) 412; Coleman v. Billings, 89 Ill. 183; Leeper v. Baker, 68 Mo. 400; Stephenson v. Wilson, 50 Wis. 95; 6 N. W. Rep. 240 (1880); Clement v. Perry, 34 Iowa, 567; Brumagin v. Bradshaw, 39 Calif. 24; Door v. School Dist., 4 Ark. 237; Royal v. Lisle, 15 Ga. 545; 60 Am. Dec. 712; Ford v. Wilson, 35 Miss. 490; 72 Am. Dec. 137; Moss v. Scott, 2 Dana (Ky.), 275.

² Stephenson v. Wilson, 50 Wis. 95; 6 N. W. Rep. 240 (1880); Nilsau v.

Henry, 35 Wis. 241; 4 Wis. 594; Hess v. Winder, 30 Calif. 349; Moore v. Thompson, 69 N. C. 120; Union, etc., Co. v. Taylor, 100 U. S. 37; Harris v. Equator, etc., Co., 8 Fed. Rep. 863.

³ Stephenson v. Wilson, 50 Wis. 95.

⁴ Booth v. Small, 25 Iowa, 177.

⁵ Bristol v. Carrol Co., 95 Ill. 84; Cantagrel v. Von Lupin, 58 Tex. 570; Clark v. Potter, 32 Ohio St. 49; Mooney v. Coolidge, 30 Ark. 655.

⁶ Miller v. L. I. R. Co., 71 N. Y. 380; Ewing v. Alcorn, 40 Pa. St. 492.

ber, stripping bark and the like, however, being continued;¹ a mere entry each year for the purpose of cutting grass;² annually occupying a sugar place for the sole purpose of making sugar;³ payment of taxes and partial occupation by a co-tenant;⁴ erecting cow pens, ranging cattle and occasionally cutting trees;⁵ annual entries for the purpose of cutting timber, feeding cattle, hunting and fishing, with the cultivation of a truck patch in summer as incidental to other pursuits;⁶ use of water of a stream during a period of abundance;⁷ going upon wild land, digging and hunting for corners and boundary lines, driving cattle on the land and employing a party to break it;⁸ using the land for the purpose of obtaining wood for fuel or fencing for a farm in the vicinity under color of title and claim of ownership;⁹ repeated cutting of timber on outlands;¹⁰ clearing land of the timber and allowing it to grow again;¹¹ having a wood pile on a vacant lot for twenty years and burying potatoes upon it for six;¹² digging sand on the land from time to time and selling the same;¹³ using a way open to and occupied by the public for the purpose of getting water;¹⁴ building a sidewalk on a street adjoining land over which there is such an easement;¹⁵ fencing the land on three sides;¹⁶ inclosing land by brush fences or fences made by felling trees lapping one upon another¹⁷—have been held to be simply occasional or sporadic

¹ Williams v. Wallace, 78 N. C. 354; Long v. Young, 28 Ga. 130; Refener v. Bowman, 53 Pa. St. 313; Anderson v. Harvey, 10 Gratt. (Va.) 386; Austin v. Holt, 32 Wis. 478; Washburn v. Cutter, 17 Minn. 361; Rivers v. Thompson, 46 Ala. 633; Parker v. Parker, 1 Allen (Mass.), 245; Slice v. Derrick, 2 Rich. (S. C.) 627.

² Wheeler v. Spinola, 54 N. Y. 377; Roberts v. Baumgarten, 51 Sup. Ct. (N. Y.) 482.

³ Wilson v. Blake, 53 Vt. 305.

⁴ McGuidy v. Ware, 67 Mo. 74.

⁵ Royal v. Lisle, 15 Ga. 545; 60 Am. Dec. 712.

⁶ Wheeler v. Winn, 53 Pa. St. 122; see Pullen v. Hopkins, 1 Lea (Tenn.) 741.

⁷ Anaheim Water Co. v. Semi-Tropic Water Co., 64 Calif. 185.

⁸ Brown v. Rose, 55 Iowa, 734.

⁹ Scott v. Delany, 87 Ill. 148; see Clement v. Perry, 84 Iowa, 564.

¹⁰ Townsend v. Reeves, 44 N. J. L. 525.

¹¹ Parker v. Parker, 1 Allen (Mass.), 245.

¹² Miller v. Downing, 54 N. Y. 631.

¹³ Parker v. Wallis, 60 Md. 15; 45 Am. Rep. 703.

¹⁴ O'Neil v. Blodgett, 58 Vt. 213.

¹⁵ Knecken v. Voltz, 110 Ill. 264.

¹⁶ Morrison v. Chapin, 97 Mass. 72; Pope v. Hamer, 8 Hun (N. Y.), 265; 74 N. Y. 24; see Kerr v. Hitt, 75 Ill. 51.

¹⁷ Slater v. Jepherson, 6 Cush. (Mass.) 129; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 239; Hale v. Glidden, 10 N. H. 397; Coburn v. Hollis, 3 Met. (Mass.) 125.

uses of lands and not sufficient to establish an adverse possession.

§ 42. **It Must Be Visible and Notorious—A Secret Possession Will Not Do.**—Possession, in order to bar a recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive and adverse.¹ Independent of positive statute law such a possession affords a presumption that all the claimants to the land acquiesce in the claim so evidenced and enforced, or that they forbear for some substantial reason to controvert the claim of the possessor or to disturb him in the enjoyment of the premises. Secret possession will not do, as publicity and notoriety are necessary as evidence of notice, and to put those claiming an adverse interest upon inquiry.² A mere occupation is not sufficient, but the possession must be adverse, as seizin and possession are supposed to be co-extensive with the right, and that the possession continues till the party is ousted thereof by an actual possession in another under a claim of right.³

§ 43. **Continuity of Possession Necessary.**—Continuity of possession is also one of the essential requisites to constitute such an adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession the seizin of the true owner is restored, and a subsequent

¹Cook v. Babcock, 11 Cush. (Mass.) 15 Ill. 271; Horbach v. Miller, 4 210; Armstrong v. Morrill, 81 U. S. Neb. 31; Peterson v. McCulloch, 50 (14 Wall.) 120 (1871); Stevens v. Hollister, 18 Vt. 294; Samuel v. Barrowscale, 104 Mass. 207; Clark v. Gilbert, 39 Conn. 97; Doe v. Campbell, 10 Johns. (N. Y.) 477; Cahill v. Palmer, 45 N. Y. 484; Saxton v. Hunt, 20 N. J. L. 487; Calhoun v. Cook, 9 Pa. St. 226; Bartholomew v. Edwards, 1 Houst. (Del.) 17; Unger v. Mooney, 63 Calif. 586; Bracken v. Jones, 63 Tex. 184; Ringo v. Woodruff, 43 Ark. 469; Brown v. Cockrell, 33 Ala. 47; Wilson v. Williams, 52 Miss. 488; Royal v. Lisle, 15 Ga. 545; 60 Am. Dec. 712; Carroll v. Gillion, 33 Ga. 539; Washburn v. Cutter, 17 Minn. 361; Furlong v. Garrett, 44 Wis. 111; Delong v. Mulcher, 47 Iowa, 445; Turney v. Chamberlain,

15 Ill. 271; Horbach v. Miller, 4 Neb. 31; Peterson v. McCulloch, 50 Ind. 35; Humphreys v. Hoffman, 33 Ohio St. 395; Velverton v. Steele, 40 Mich. 538; Malloy v. Bowden, 86 N. C. 251; Ekey v. Inge, 87 Mo. 493; Beatty v. Mason, 30 Md. 409; Creekmur v. Creekmur, 75 Va. 430; Core v. Faupel, 24 W. Va. 238.

²Bradstreet v. Huntington, 5 Pet. (U. S.) 502; Blood v. Wood, 1 Met. (Mass.) 528; Ewing v. Burnett, 11 Pet. (U. S.) 53; Armstrong v. Morrill, 31 U. S. (14 Wall.) 120 (1871).

³Armstrong v. Morrill, 81 U. S. (14 Wall.) 120 (1871); Angell on Limitations, 377; Clark v. Courtney, 5 Pet. (U. S.) 354; McIver v. Ragan, 2 Wheat. (U. S.) 29; Kirk v. Smith, 9 Wheat. (U. S.) 288.

wrongful entry by another constitutes a new disseizin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute, a new adverse possession for the time limited must be taken for that purpose.¹

Illustrations.

Continuity of possession: One claiming title to land by three years' adverse possession, must show continuous possession for that period; and where the trial court has found upon conflicting evidence, that plaintiff did not maintain such possession, the claim must fail. *Gunter v. Meade* (Tex.), 14 S. W. Rep. 562; Am. Dig. 1891, 47.

The adverse user of an irrigating ditch, through the lands of another, only during the cropping season, the ditch not being needed at other times, constitutes a continuous adverse user, as the omission to use when not needed does not break the continuity of the user. *Hesperia Land & Water Co. v. Rogers*, 83 Cal. 10; 23 Pac. Rep. 196 (1890).

Land was deeded by a father to his daughter, but by mistake part of the premises intended to be conveyed was omitted in the description. The daughter took possession of all the tract, and occupied it notoriously and exclusively for several years. Afterward she transferred possession to her husband, under a deed in which existed the same defect of description, but the husband took possession in the belief that there was a perfect title to the whole tract. *Held*, that the adverse possession was not interrupted. *Vandall v. St. Martin*, 42 Minn. 163; 44 N. W. Rep. 525 (1890).

The right of the owner of the title to land to recover possession is not barred by the Alabama statute of twenty years' limitation, unless there has been during the whole of that period the same continuity of possession required to perfect title by adverse possession. *Ross v. Goodwin*, 88 Ala. 390; 6 So. Rep. 682 (1889).

¹ *Melvin v. Proprietors, etc.*, 5 Met. Riggs v. Fuller, 54 Ala. 141; Hall v. (Mass.) 5; 28 Am. Dec. 384; *Armstrong v. Morrill*, 81 U. S. (14 Wall.) 120 (1871); *Faupel*, 24 W. Va. 238; *Creekmur v. Brinsfield v. Carter*, 2 Kelly (Ga.), 143; *Creekmur*, 75 Va. 430; *Malloy v. Bruden*, 86 N. C. 251; *Ringo v. Woodruff*, 43 Ark. 469; *Lynde v. Williams*, 68 Mo. 365; *Thompson v. McLaughlin*, 66 Ill. 407; *Steeple v. Downing*, 60 Ind. 478; *Unger v. Mooney*, 63 Calif. 586; 49 Am. Rep. 100; *Sparrow v. Hovey*, 44 Mich. 63; *Messer v. Reginniter*, 32 Iowa, 312; *Horbach v. Miller*, 4 Neb. 31; *Bracken v. Jones*, 63 Tex. 401; *Laramore v. Minish*, 43 Ga. 282; 184.

Adverse possession, to be available, must have been continuous for the statutory period. *Rev. St. Tex.*, Art. 3198, defining adverse possession to be an actual and visible appropriation, commenced and continuous under claim of right, etc. *Holstein v. Adams*, 72 Tex. 485; 10 S. W. Rep. 560 (1889).

A purchaser at a trust sale succeeds to the possession of the mortgagor, and the continuity of adverse possession is not broken because, after executing the deed of trust, the mortgagor conveyed to one who held for several years before the sale. *Atchison v. Pease*, 96 Mo. 566; 10 S. W. Rep. 159.

Where defendant proves continuous adverse possession for sixteen years under a title bond, and fifteen years under a deed, from his vendor, it is error to assume in an instruction that plaintiff has made out a perfect title from the commonwealth, and to charge that, if defendant has entered on the tract covered by plaintiff's patent, the verdict should be for plaintiff, without instructing as to the effect of such possession. *Bailey v. Tygart Valley Iron Co. (Ky.)*, 10 S. W. Rep. 234.

Possession of land for school purposes for such length of time each year as school is taught may be regarded as actual, continuous and adverse, so as to give title, if continued for the statutory period. *Singleton v. School Dist. (Ky.)*, 10 S. W. Rep. 793; *Am. Dig.* 1889, 39.

No title by adverse possession can arise from different entries and holdings of persons between whom there is no privity of estate; nor from several separate entries and holdings by the same person, if the possession of another claimant intervenes, where no one of such holdings is itself of sufficient duration to perfect such a title. *Ross v. Goodwin*, 88 Ala. 390; 6 So. Rep. 682 (1889).

§ 44. Continuous Adverse Possession a Question of Fact for the Jury.—The question as to whether the possession claimed to be adverse has been continuous or has been interrupted is a question of fact to be determined by the jury under proper instructions by the court.¹

§ 45. An Interruption Defined.—Under the law of adverse possession an interruption is defined to be any act of the occupant which interrupts the running of the statute of limitations. In order to cause an interruption it is not necessary that the occupant should cease to occupy the lands in question. Any act of his which renders his possession not adverse to the real owner is sufficient.²

¹ *Bowen v. Guild*, 130 Mass. 131; 408; *Russell v. Ewing*, 38 Ala. 44; *O'Hara v. Richardson*, 46 Pa. St. 385; *Byrne v. Lowry*, 19 Ga. 27; *Gower v. Jackson v. Wood*, 12 Johns. (N. Y.) Quinlan, 40 Mich. 572; *Congdon v. 242*; *Beverly v. Burke*, 9 Ga. 440; 54 *Morgan*, 14 S. C. 587; *Warren v. Am. Dec.* 351. *Putnam*, 63 Wis. 410; *Chandler v.*

² *Armstrong v. Merrill*, 14 Wall. Rushing, 38 Tex. 591.
(U. S.) 120; *Borel v. Rollins*, 30 Calif.

Illustrations.

Interruption of possession: Plaintiff's grantor owned a tract of wild land adjoining the cultivated and inclosed land of defendant. During part of the ten years immediately before suit, defendant leased the said wild land for the purpose of inclosing it and pasturing his stock thereon. The lease which was oral, was for all plaintiff's tract, the understanding being that it was all uninclosed. After plaintiff's purchase, and upon a survey of his land, it was found that his east line was within the inclosure, and over the boundary of defendant's land. *Held*, that the lease would not prevent the running of the statute as to the strip inclosed, it being so inclosed as a part of defendant's land, and occupied by him, as owner, to certain fixed boundaries, adopted as the line, before plaintiff's purchase. *Levy v. Yerga*, 25 Neb. 764; 41 N. W. Rep. 773 (1889).

Where the adverse possession is commenced in the lifetime of the ancestor, the running of the statute is not suspended by the coverture of plaintiff, who derived the land from her ancestor. *Wilkerson v. St. Louis Sectional Dock Co.*, 102 Mo. 130; 14 S. W. Rep. 177 (1890).

The running of prescription in favor of one holding by adverse possession is interrupted by a sale for taxes. *Davies v. Collins*, 43 Fed. Rep. 31 (1890).

Where a "squatter" entered upon part of the riparian land of another, claiming adversely, and diverted and used the waters of the stream for the irrigation thereof, such use was "interrupted," so as to prevent the running of limitation in the squatter's favor, by the bringing of ejectment for the lands. *Alta L. & W. Co. v. Hancock*, 85 Cal. 219; 24 Pac. Rep. 645 (1890).

Where defendant alleges adverse possession, evidence that while he was in possession his right was "contested" is properly excluded, the only available contest being by suit carried to judgment. *Bullock v. Smith*, 72 Tex. 545; 10 S. W. Rep. 687 (1889).

Possession resumed by grantor can not be held to be under color of his original grant, and his claim under the statute of limitations is restricted to the limits of his actual occupation, unless they embrace less than 640 acres, and his title by adverse possession matures before Rev. St. Tex. took effect, in which case he is restricted to 640 acres, including his improvements as occupied. If such title matures after the Revised Statutes took effect, he is restricted to 160 acres, unless a larger area is inclosed. Rev. St. Tex., Art. 1195; *Id.*

In trespass to try title defendant claimed title by adverse possession. It appeared that, after he had taken possession of the land, and within the statutory period, he executed an instrument reciting that he held the land under a third person. Afterward defendant repudiated the transaction and posted notices. *Held*, that defendant's possession was not continuously hostile, but was interrupted by the acknowledgment of title in such third person. *Distinguishing* *Portis v. Hill*, 14 Tex. 69; *Robinson v. Bazoon*, 79 Tex. 524; 15 S. W. Rep. 585 (1891).

One in adverse possession of land to which the title is in several persons may purchase the title in one of them without abandoning his adverse holding as to the title of the rest. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 387; 48 N. W. Rep. 17 (1891).

Occasional interruptions of possession during the period necessary to create a title by adverse possession, which do not impair the use to which

the occupant subjects the property, and for which it is chiefly valuable, will not necessarily defeat the presumption of a grant. *Fuller v. Fletcher*, 44 Fed. Rep. 34 (1890).

Where actual possession under claim of title is taken of land of which another has constructive possession, the statute of limitations ceases to run in favor of the person who had such constructive possession. *Greenlee v. Taylor*, 79 Tex. 149; 14 S. W. Rep. 1056 (1891).

One in possession of land under a tax deed, which was insufficient to vest the title in him, can not claim title by adverse possession where it is shown that, within the time required to perfect such title, there was a judgment against his tenant, in possession of part of the land, in favor of a grantee of the former owner, under which such grantee was put in possession. *McGrath v. Wallace*, 85 Cal. 622; 24 Pac. Rep. 793 (1890).

Three forty-acre tracts were platted and lots sold. One person acquired title to some, and color of title under a tax deed to others, among them the lots in suit; and the plat was vacated. He deeded the three forties in 1866 to one who took and held possession until 1885, when he sold. The purchaser again platted the land, and sold to defendant's grantor the lots in controversy, which have been vacant and unoccupied since 1885. *Held*, that the adverse possession was interrupted in 1885, and the twenty-year limitation had not run. *Morris v. McClary*, 43 Minn. 346; 46 N. W. Rep. 238 (1890).

The title of an adverse occupant of land under color of a deed purporting to convey the whole interest therein, executed by the two survivors of four tenants in common, is not affected by subsequent partition proceedings, to which the adverse occupant is not a party, between such surviving tenants and the heirs of their deceased co-tenants. *Hall v. Caperton*, 87 Ala. 285; 6 So. Rep. 388 (1888).

While the unknown intrusion of a mere trespasser will not break the continuity of possession, unless continued for such a length of time that knowledge will be presumed, or so as to become an assertion of an adverse right, yet a charge that the entry of a mere trespasser without claim or title would not interrupt the continuity of defendant's possession, states the rule too broadly, and is properly refused. *Woodstock Iron Co. v. Roberts*, 87 Ala. 436; 6 So. Rep. 349 (1888).

In an action to set aside a sale of real estate by an administrator, where the complaint alleges that defendant, recognizing the invalidity of its title under such sale, had surrendered the land to an administrator *de bonis non*, which allegation is admitted by demurrer, defendant can not claim to have acquired title by seven years' adverse possession under its claim of title from the administrator. *Deans v. Wilcoxon*, 25 Fla. 980; 7 So. Rep. 163 (1890).

The fact that lands adversely possessed by a disseisor, who erected buildings and made other improvements, became vacant from time to time for want of tenants, did not interrupt adverse possession. *Costello v. Edson*, 44 Minn. 135; 46 N. W. Rep. 299 (1890).

Revesting of title: Where one, by twenty-one years' adverse possession, has acquired title to land claimed by the adjoining owner, title is not revested in the latter by the act of the former in removing his fence for his own convenience, so as to exclude such land. *Jones v. Hughes* (Pa.), 16 Atl. Rep. 849; Am. Dig. 1889, 42.

Of realty in hands of receiver: While realty, of which a debtor has had adverse and continuous possession under written color of title, is in the hands of a receiver appointed at the instance of creditors, the statute of prescription continues to run in favor of such debtor's title against strangers to the pending litigation. *Verdery v. Savannah, F. & W. Ry. Co.*, 82 Ga. 675; 9 S. E. Rep. 1133.

Recognition of owner's title: A city can not recover a strip of land inclosed and occupied by defendants for twenty years, during which time the city had paved in front of the strip, and made no claim to it, recognizing defendant's title. *Bosworth v. City of Mt. Sterling (Ky.)*, 13 S. W. Rep. 920; *Am. Dig.* 1890, 37.

An acknowledgment by a mere squatter, of ownership in another person, interrupts the running of adverse possession. *Daveis v. Collins*, 43 Fed. Rep. 31 (1890).

Though the husband be a drunkard, and the wife support the family by her industry, he still continues the head of the family, and any admission by him as to whether his occupation of land is adverse concludes her right after his death. *Id.*

The mental capacity of the person in possession to execute a lease, thereby acknowledging another's ownership, can not be inquired into as against an innocent purchaser. *Id.*

One who, while in possession, recognizes the title of another, and offers to purchase, can not set up his own possession as adverse, but may show title out of such person, if the acknowledgment of title in him was the fruit of mistake or imposition; but otherwise, if he entered under him. *Jackson v. Cuerden*, 2 Johns. C. (N. Y.) 353; *Jackson v. Spear*, 12 Wend. (N. Y.) 401.

A letter written by one in possession of land, to the attorney of other claimants, in which he offers to lease the land from them, is a recognition of their title, so as to preclude him from claiming adverse possession, though he afterward holds longer than the statutory period, where he does nothing to indicate that such holding is adverse. *Horton v. Davidson*, 135 Pa. St. 186; 19 Atl. Rep. 934 (1890).

A person in possession may quiet his title by taking a quit-claim from a stranger, and if the quit-claim purports to be of the stranger's interest in the whole land, instead of an undivided interest, it is no evidence of an acknowledgment of an outstanding title in common with others standing in the same position as such stranger. *Northrup v. Wright*, 7 Hill (N. Y.), 476; *Hill v. Hill*, 4 Barb. (N. Y.) 419.

§ 46. **Effect of Interruptions in the Possession.**—As we have seen, the adverse possession, in order to be a bar, must be continuous. Every discontinuance or interruption of such possession has in law the effect to restore the possession to the real owner, it being a well settled rule of law that nothing short of an adverse possession with all of the legal essentials can divest the real owner of his title.¹ And this rule of law

¹ *Armstrong v. Merrill*, 14 Wall. 99; *Bliss v. Johnson*, 94 N. Y. 235; (U. S.) 120; *Virgin v. Land*, 82 Ga. *Sherman v. Kane*, 86 N. Y. 56; *Hill* 572; *Thompson v. Burhans*, 79 N. Y. *v. Sanders*, 6 Rich. (S. C.) 62; *Hold-*

applies equally to cases where the person quitting the possession makes a new entry or resumes his possession, and where the new entry is made or possession is taken by another person.¹ The possession must be continuous; an interruption but for a single day is fatal. A gap occurring during the statutory period is sufficient to destroy its continuity, but where the possession has been completed under the statute, and title acquired, it will not be forfeited by an interruption thereafter. The gap or interruption must occur within the time specified by the statute of limitations.²

§ 47. **What is Required of the Claimant to Perfect His Title—Abandonment of the Premises.**—If a person holding lands in adverse possession abandon the same before the expiration of the statutory period, his abandonment will of course amount to an interruption of the possession of the most effective kind; but if the abandonment occurs after the adverse holding has ripened into a title it will be otherwise. The law requires of the claimant holding adversely nothing but an adverse possession for the period required. As the period closes, his possession ripens into a title without any additional acts upon his part.³

Illustrations.

Abandonment by owner: Where the owner of property has been excluded therefrom, and the intruder is in notorious and exclusive adverse possession, no declaration of abandonment on the part of the owner is necessary in order that his title may be barred by such adverse possession. *Middlesex Co. v. Lane*, 149 Mass. 101; 21 N. E. Rep. 228 (1889).

Where a railroad company, after condemning a right of way and grading its road-bed, abandons the work, and exercises no acts of ownership for over ten years, the question whether an adjoining land owner acquired title to such right of way by adverse possession depends on whether he took exclusive possession, claiming it as his own, and whether he and his grantees so held it continuously for a period of ten years thereafter, and before the railroad company again began to exercise control over it. *Brown v. Chicago, B. & K. C. Ry. Co.*, 101 Mo. 484; 14 S. W. Rep. 719 (1890).

fast v. Shephard, 6 Ired. (N. C.) 364; *wine v. Holman*, 23 Pa. St. 274; *Malloy v. Breeden*, 86 N. C. 251; *Crispin v. Hannavan*, 50 Mo. 536; *Steeple v. Downing*, 60 Ind. 478; *Core v. Faupel*, 24 W. Va. 238; *Casey v. Inloes*, 1 Gill (Md.), 430.

¹ *Melvin v. Proprietors, etc.*, 5 Met. (Mass.) 5; 38 Am. Dec. 384; *Allen v. Holten*, 20 Pick. (Mass.) 465; 241. ² *Olwine v. Holman*, 23 Pa. St. 279; *Malloy v. Breeden*, 86 N. C. 251; *Sherman v. Kane*, 86 N. Y. 57; *Spofford v. Bennett*, 55 Tex. 293.

³ *Sawyer v. Kendall*, 10 Cush. (Mass.) 465; 241. *Malloy v. Breeden*, 86 N. C. 251; *Ol-*

A judgment for plaintiff in ejectment, without possession taken under it, or some act making defendant's possession subordinate to plaintiff's title, will not stop the running of the statute of limitations, and the mere fact that defendant dismisses his appeal from the judgment does not amount to an abandonment of all claims adverse to the land. *Mabary v. Dollarhide*, 98 Mo. 198; 11 S. W. Rep. 611 (1889).

If a party in possession, claiming under a deed, supposing that there was some defect in the execution of it, applies to purchase the title of a person claiming the same premises under a subsequent deed, for the purpose of strengthening or quieting his own title, this is not an abandonment of his own title, nor an acknowledgment of a superior title in another. *Jackson v. Newton*, 18 Johns. (N. Y.) 355.

Suspension of statute: An abandonment of land by a person in adverse possession will stop the running of the statute, though the taxes for the land are subsequently assessed against him, and though the abandonment was with the intention to return. *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264; 6 So. Rep. 837 (1889).

§ 48. What Has Been Held to Constitute an Interruption.

—The enforcement of a writ of possession in an action of ejectment;¹ an agreement to arbitrate;² permitting the inclosing fences to decay and become insufficient to protect the land;³ forfeiture to the State for taxes;⁴ attornment of the tenant of the adverse holder to real owner;⁵ an order of court for the conveyance of the land;⁶ an offer on the part of the adverse occupant to purchase the land in question from the person claiming to be the real owner⁷—have been held sufficient to interrupt the running of the statute of limitations.

§ 49. What is Not an Interruption Under the Decisions.

—The mere intrusion of a trespasser;⁸ a purchase of the land in question at a tax sale by the occupant;⁹ a non-user caused

¹ *Dunn v. Miller*, 75 Mo. 260.

² *Perkins v. Blood*, 36 Vt. 273.

³ *Bord v. Rollins*, 30 Calif. 408.

⁴ *Armstrong v. Merrill*, 14 Wall. (U. S.) 120.

⁵ *Russell v. Ewing*, 38 Ala. 44; but see *Hayner v. Boardman*, 119 Mass. 414; *Thompson v. Pioche*, 44 Calif. 408.

⁶ *Gower v. Quinlan*, 40 Mich. 572.

⁷ *Jackson v. Brittan*, 4 Wend. (N. Y.) 507; *Jackson v. Croy*, 12 Johns. (N. Y.) 427; *Pacific, etc., Ins. Co. v. Stroup*, 63 Calif. 150; *Lovell v. Frost*, 44 Calif. 474; *Central P. R. Co. v.*

Meade, 63 Calif. 113; *Jackson v. Cuerdon*, 2 Johns. Cas. (N. Y.) 353; but see *Walburn v. Ballen*, 68 Mo. 164; *Chapin v. Hunt*, 40 Mich. 595; *Tobey v. Secor*, 60 Wis. 310. The general rule of law is that offers made for the purpose of settling suits and controversies and not accepted can not be used as evidence against the party making such offers.

⁸ *Bell v. Denson*, 56 Ala. 444; *Doe v. Eslava*, 11 Ala. 1028; *Raynor v. Lee*, 20 Mich. 384; but see *Whalley v. Small*, 29 Iowa, 288.

⁹ *Hayes v. Martin*, 45 Calif. 559.

by the burning of the fences;¹ the fact that a person having an unperfected title enters and collects rents;² occasional acts of trespassers claiming under color of title;³ a short and reasonable time occasioned by change of business,⁴ or a short absence on business;⁵ absences where a member of the family remains;⁶ where the occupant occasionally vacates the premises, but with no intention to abandon them;⁷ the purchase by the occupant of land claiming as owner of an outstanding claim of title⁸—have been held insufficient to arrest the running of the statute.

§ 50. **Purchase of Outstanding Claims by an Adversé Occupant.**—A person in the possession of lands as an adverse occupant claiming ownership may purchase outstanding claims of title from third persons without abandoning or impairing his own title or acknowledging the validity of the claim of title purchased.⁹ But an offer to purchase from the real owner is in law a recognition of his title sufficient to interrupt the adverse possession, and will bar the defense of adverse possession.¹⁰

¹ Ford v. Wilson, 35 Miss. 490.

² Donahue v. O'Connor, 45 N. Y. Sup. Ct. 278.

³ Duren v. Sinclair, 22 S. C. 361.

⁴ De la Vega v. Butler, 47 Tex. 529.

⁵ Sailor v. Hertzog, 10 Pa. St. 296; Cunningham v. Patton, 6 Pa. St. 355.

⁶ Cunningham v. Brumboch, 23 Ark. 336.

⁷ Frigate v. Pierce, 49 Mo. 441; Crespin v. Hannaran, 50 Mo. 536; De la Vega v. Butler, 47 Tex. 529; Harper v. Topley, 35 Miss. 506; Stettinische v. Lamb, 18 Neb. 619; 26 N. W. Rep. 374; Hughs v. Pickering, 14 Pa. St. 297; Hattkins v. Crow, 32 Ga. 367.

⁸ Blight v. Rochester, 7 Wheat. (U. S.) 535; Hays v. Martin, 45 Calif. 559; Ridgeway v. Holleday, 59 Mo. 444; Jackson v. Smith, 13 Johns. (N. Y.) 406; Northrop v. Wright, 7 Hill (N. Y.), 476; Parker v. Proprietors, etc., 3 Met. (Mass.) 91; 37 Am. Dec. 121; Chapin v. Hunt, 40 Mich. 595; Bannan v. Bannon, 34 Pa. St. 263.

⁹ Blight v. Rochester, 7 Wheat. (U. S.) 535; Jackson v. Given, 8 Johns. (N. Y.) 137; 5 Am. Dec. 328; Jackson v. Smith, 13 Johns. (N. Y.) 406; Northrop v. Wright, 7 Hill (N. Y.), 476; Chapin v. Hunt, 40 Mich. 595; Parker v. Proprietors, etc., 3 Met. (Mass.) 91; 37 Am. Dec. 121; Hays v. Martin, 45 Calif. 559; Cannon v. Stockton, 36 Calif. 535; Owens v. Meyers, 20 Pa. St. 134; 57 Am. Dec. 693; Bannon v. Brandon, 34 Pa. St. 263; Brandon v. Bannon, 38 Pa. St. 63; Lodge v. Patterson, 3 Watts (Pa.), 74; 27 Am. Dec. 385; Coperton v. Gregory, 11 Gratt. (Va.) 505.

¹⁰ Lovell v. Frost, 44 Calif. 474; Jackson v. Croy, 12 Johns. (N. Y.) 427; Jackson v. Cuerdon, 2 Johns. (N. Y.) 353; Jackson v. Britton, 4 Wend. (N. Y.) 507; Pac. Sus. Co. v. Stroup, 63 Calif. 150; Central, etc., Ry. Co. v. Mead, 63 Calif. 113. But see Tobey v. Secor, 60 Wis. 310; Chapin v. Hunt, 40 Mich. 595; Walbrunn v. Ballen, 68 Mo. 164.

§ 51. **Holding in Adverse Possession by Tenants.**—While, in order to bar the right of action of the owner of lands the adverse possession must be actual, open, hostile, exclusive, accompanied by an intention to claim adversely and continuous, still the continuity of the holding will not be interrupted by the possession, during any part of its period, of one who occupies the premises as a tenant of the alleged adverse possessor. In such cases the tenant's possession is that of his landlord.¹

§ 52. **Continuous Possession by Successive Occupants.**—When a person in the adverse possession of lands abandons or vacates the lands or quits the possession, the seizin of the real owner is restored and the person who enters upon the lands in question afterward commits a new disseizin of the owner. But a person holding in adverse possession may dispose of his interest in the lands by an agreement in writing or a deed, and in case of his death it will descend to his heirs under the laws of descent. In either case the possession of the parties will be continuous and will constitute one entire adverse possession.²

No written instrument is necessary to establish privity between successive occupants pending the running of the statutory period, in so far as a transfer of the land, of which there is a *pedis possessio*, or actual, as distinguished from constructive, possession, is concerned; and, as to the part of which there is simply constructive possession, while a written instrument is essential to privity, it need not be a formal deed. *Kendrick v. Latham*, 25 Fla. 819; 6 So. Rep. 871 (1890).

Where the right of way of a railroad company expires with the life of the corporation, and the original company was dissolved by merger into a new company, which has operated the road for more than twenty years, the new company acquires the right of way by adverse possession and user. *Affirming 46 Hun. 612. Miner v. N. Y. Cent. & H. R. R. Co.*, 123 N. Y. 242; 25 N. E. Rep. 339 (1890).

A, claiming title to land by descent, made a parol gift of the same to

¹ *San Francisco v. Fulde*, 37 Cal. 47 Vt. 584; *Branson v. Scanlan*, 59 349; *Raynor v. Lee*, 20 Mich. 384; *Tex. 222*; *St. Louis v. Gorman*, 29 Mo. 593; 77 Am. Dec. 586; *Furlong v. Garrett*, 44 Wis. 111; *Doe v. Brown*, 4 N. W. Rep. 551 (1886).

² *Lea v. Polk Co.*, 21 How. (U. S.) Ind. 143; *Hanson v. Johnson*, 62 Md. 493; *Boswell v. De La Lanza*, 20 How. 65; 50 Am. Rep. 199; *Hays v. Morrison*, 30 Ga. 971; *Benson v. Stewart*, 12 Ill. App. 390; *Jackson v. Thomas*, 30 Miss. 49; *Riggs v. Fuller*, 54 Ala. 16 *John. (N. Y.) 293*; *Wade v. Lindsey*, 6 Met. (Mass.) 407; *Schrack v. Zubler*, 34 Pa. St. 38; *Day v. Wilder*, (U. S.) 540.

B under which B entered, and afterward A conveyed the land to B; *held*, that if the deed related back to the entry of B, there was an adverse possession, commencing in B; and that if it did not, still, as B, by virtue of the parol gift, became the tenant at will of A, and his possession was to be deemed that of A, there was an adverse possession, commencing in A. *Jackson v. Ellis*, 13 Johns. (N. Y.) 118.

§ 53. **Privity Between Successive Adverse Holders.**—The rule laid down by the great majority of courts and by the text writers, and supported by the weight of authority, and which must be regarded as the true rule, is that privity between successive adverse holders is indispensable, and this upon the principle that, unless the successive adverse possessions are connected by privity, the disseizin of the real owner resulting from the adverse possession is interrupted, and during the interruption, though but for a moment, the title of the real owner draws to it the seizin or possession.¹ The privity referred to exists between any two successive holders where the later takes under the earlier holder, as by descent; for instance, a widow under her husband, a child under its parent, or by will or grant, or by any voluntary conveyance or transfer of possession.²

§ 54. **Tacking Different Possessions, etc.**—It is a principle well established that where several persons enter on land in succession, the several successions can not be tacked so as to make a continuity of possession unless there is a privity of estate, or the several titles are connected. Whenever one quits the possession the seizin of the true owner is restored, and an entry afterward by another wrongfully, constitutes a new disseizin.³

¹*Sherin v. Brackett*, 36 Minn. 152; *Langdon*, 22 Ohio St. 32; *Moore v. 30 N. W. Rep.* 551 (1886); *Melvin v. Small*, 9 Pa. St. 194.

Proprietors, etc., 5 Met. (Mass.) 15; ²*Leonard v. Leonard*, 7 Allen Hays v. Boardman, 119 Mass. 415; (Mass.), 277; *Sherin v. Brackett*, 36 McIntire v. Brown, 28 Ind. 347; Minn. 152; 30 N. W. Rep. 551 (1886); *Jackson v. Leonard*, 9 Cow. (N. Y.) *Hamilton v. Wright*, 30 Iowa, 480; 653; *Wood on Limitations*, § 271; *San Francisco v. Fulde*, 37 Calif. 349; *Crispen v. Hanavan*, 50 Mo. 536; *Shuffleton v. Nelson*, 2 Sawy. (U. S. C. C.) 540; *Angel on Limitations*, §§ 413, 414; ³*Wilde, J., in Melvin v. Proprietors, etc.*, 46 Mass. 32; 28 Am. Dec. 384 (1842); *Potts v. Gilbert*, 3 Wash. C. Scanlan, 59 Tex. 222; *McNesley v. C.* 475; *Ward v. BartHolomew*, 6

But when one of two disseizors in possession as tenants in common, abandons the land, his abandonment does not inure to the benefit of the disseizee, but the co-tenant holds the land against the disseizee, in the same manner as if he had been from the beginning a sole disseizor. No conveyance of the moiety held by the other disseizor is necessary, and the disseizee can not regain his seizin except by entry or action.¹

§ 55. **The Law Stated by Bigelow, J.**—The general rules of law respecting successive disseizins are well settled. To make a disseizin effectual to give title under it to a second disseizor, it must appear that the latter holds the estate under the first disseizor, so that the disseizin of one may be connected with that of the other. Separate successive disseizins do not aid one another, where several persons successively enter on land as disseizors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate; their several consecutive possessions can not be tacked, so as to make a continuity of disseizin, of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseizins as constituting a continuous possession, and conferring a title upon the last disseizor, there must have been a privity of estate between the several successive disseizors. To create such privity, there must have existed, as between the different disseizors, in regard to the estate of which a title by disseizin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or deviser and devisee. In such cases, the title acquired by disseizin passes by descent, deed or devise. But if there is no such privity, upon the determination of the possession of each disseizor, the seizin of the true owner revives

Pick. (Mass.) 415; Brandt v. Ogden, 1 Johns. (N. Y.) 158; Doe v. Campbell, 10 Johns. (N. Y.) 475; Jackson v. Leonard, 9 Cow. (N. Y.) 653; Allen v. Holton, 20 Pick. (Mass.) 465; Schrack v. Zubler, 34 Pa. St. 38; Winslow v. Newell, 19 Vt. 164; Day v. Wilder, 47 Vt. 584; Satterwhite v. Rosser, 61 Tex. 166; Shaw v. Nicolay, 30 Mo. 99; Furlong v. Garrett, 44 Wis. 111; McNeeley v. Langdan, 22

Ohio St. 32; McIntire v. Brown, 28 Ind. 347; Adams v. Tierman, 5 Dana (Ky.) 394; Hanson v. Johnson, 62 Md. 251; 50 Am. Rep. 199; Chilton v. Wilson, 9 Humph. (Tenn.) 399; Hays v. Morrison, 30 Ga. 971; Riggs v. Fuller, 54 Ala. 141; San Francisco v. Fulde, 37 Calif. 349.

¹Wilde, J., in Melvin v. Proprietors, 46 Mass. 15 (1842).

and is revested, and a new, distinct disseizin is made by each successive disseizor.¹

Illustrations.

Tacking: A tenant in common and the holder of a void tax deed joined in a conveyance of the whole estate. The land was chiefly meadow, only a small part being suitable for cultivation. The purchaser lived on the land seventeen years, cultivated a garden, cut the hay every year, and constructed a system of ditches for drainage. He died February 12, 1885, and one S. at once took charge of his property, and was appointed administrator in the latter part of April. He then removed the personal property, and harvested the hay. In August, 1886, by order of the Probate Court, he sold the land to the defendant, who cut the hay in 1886, 1887, 1888 and 1889. *Held*, that the possession had been adverse, continuous, and exclusive for twenty years. *Ricker v. Butler*, 45 Minn. 545; 48 N. W. Rep. 407 (1891).

The mere fact that two strangers to the title succeeded each other in the possession of lands raises no presumption of privity between them; and therefore, in computing the period which will give title by prescription, the last occupant is not entitled to count the time of his predecessor's possession. *Lucy v. Tennessee & C. R. Co.* (Ala.), 8 So. Rep. 806; Am. Dig. 1891, 49.

A father gave his son certain land and put him in possession, the son conveying certain land to him. On account of the son's drunkenness the father conveyed the land to his grandson, said son's child, reserving the possession and use of the premises for the life of the son, and also of the son's wife, if she should remain his wife until his death. In a suit for divorce by the wife the issue was presented whether the son had a life estate, and, while the court did not expressly rule on the question, it, in granting a divorce, enjoined the son from interfering with the property, and made the wife receiver thereof, granting her the possession and rents. Prior to the divorce, the son occupied and improved the premises, he and his father construing the deed as giving the son a life estate. The father had full knowledge of the divorce proceedings and the order therein, and made no claim to the property for nearly ten years thereafter. After the divorce, the wife continued to occupy the premises and improve them, claiming an estate for the life of her former husband. *Held*, that under 2 Comp. Laws Utah 1888, §§ 3131-3134, providing that an action to recover real estate or the possession thereof shall be brought within seven years, the father's cause of action was barred, the sum of the adverse possessions of the son and the divorced wife being more than that period. *Wells v. Wells* (Utah), 24 Pac. Rep. 752; Am. Dig. 1891, 43.

In ejectment, defendants offered in evidence the record of a judgment in favor of the administrator of one from whom they derived title against plaintiff's tenant for possession of the land in controversy. *Held*, that the possession of the administrator under such judgment might be added to

¹ Bigelow, J., in *Sawyer v. Kendall*, 409; *Allan v. Holton*, 20 Pick. (Mass.) 10 Cush. (Mass.) 244; citing *Potts* 458, 465; *Melvin v. Proprietors of v. Gilbert*, 3 Wash. C. C. (U. S.) 479; *Locks and Canals*, 5 Met. 15, 52; *Ward v. Bartholomew*, 6 Pick. (Mass.) *Wade v. Lindsey*, 6 Met. 407.

that of defendants in order to make the length of time required for title by adverse possession, though defendants claimed under a deed from the intestate's heir. *Spotts v. Hanley*, 85 Cal. 155; 24 Pac. Rep. 738 (1890).

A disseizor in possession has an interest in the land which he may transfer with the possession to another, and the latter's possession under such transfer may be added to that of the disseizor for the purpose of making out title by adverse possession under the original claim of title. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 387; 48 N. W. Rep. 17 (1891).

B., the grantee of a deed which purported to convey the whole estate, but which was executed only by the attorney in fact of the owner of an undivided half interest, entered and took possession of the whole place under said deed, and continued in possession until his death, openly and notoriously asserting title to all the land. After his death, two of his minor children, his widow, and her second husband, executed a deed of said premises to H., who entered and continued in possession a certain period, claiming only under such deed. The sum of such possessions was more than the period necessary for acquiring title by adverse possession under color of title. Before the expiration of such period, said widow died. After the expiration of such period, the heirs of H. obtained a deed of the undivided half interest, which had not, in fact, been conveyed to B., the first grantee. Thereafter, the sole heir of said infant grantors, who died while infants, upon reaching his majority, disaffirmed their deed. *Held*, in ejectment by such heir against the heirs of H., that, as such disaffirmance made the infants' deed void *ab initio*, H. and his heirs had been only tenants of the life estate of the widow until her death, and thereafter tenants by sufferance of the heirs of B., and therefore the paper title of B. to the whole estate had, by the continued possession of the tenants, ripened into a perfect title. *Harvey v. Briggs* (Miss.), 8 So. Rep. 274; Am. Dig. 1891, 49.

Defendant's possession was within the apparent interlaps of three grants, complainant's, defendant's, and a third; but complainant's grant recited that there was included within the calls thereof a certain number of acres of land of prior and legal claims. The proof showed that these acres were included in said third grant, which was a prior grant, and that said possession was within said acres. *Held*, that the older claim having been excluded from complainant's grant, the possession was not in fact within the interlaps of complainant's and defendant's grants, and therefore was not adverse to complainant's. *Bleidorn v. Pilot Mountain Coal & Min. Co.* (Tenn.), 15 S. W. Rep. 737; Am. Dig. 1891, 43.

In 1835 P. conveyed certain premises to S., receiving a mortgage for the purchase money. S. conveyed same to W., who in 1843 was declared a bankrupt. In 1845 P. commenced suit to foreclose the purchase money mortgage, without making W. or his assignee in bankruptcy a party. The premises were sold under decree of foreclosure, and purchased by P., who received a conveyance in 1847. Plaintiff's testator purchased the premises at a judicial sale in an action of partition between P.'s heirs in 1858. In 1850 W. died intestate, and in 1858 P.'s administrator brought an action against W.'s widow and the assignee in bankruptcy to foreclose S.'s purchase money mortgage to P., and plaintiff's testator purchased at the foreclosure sale. At this time one Z. was in possession of the premises, and plaintiff's

testator agreed that he might hold them without payment of rent, which he did till 1865, at which time he sold his rights therein and the crops thereon to B., who remained in possession till 1873. Defendants claimed title through the purchaser at a sale in bankruptcy made by W.'s assignee in 1869. *Held*, that plaintiff's testator, having had possession of the premises since 1847 through P., his heirs and grantees, for a period of more than twenty years, was entitled to the premises: and that the strength of their title by adverse possession for that length of time was unaffected by the fact that the legal title to the premises remained outstanding for a portion of that time in W.'s assignee in bankruptcy; and by the fact that Z., tenant at will of plaintiff's testator, demised his holding to B., in the absence of evidence that plaintiff's testator had ever exercised his option to treat such demise as a disseizin. *Landon v. Townshend*, 14 N. Y. Sup. 522; Am. Dig. 1891, 54-55.

Where plaintiff's grantor claimed the land in dispute by adverse possession, but did not include it in his contract to convey to plaintiff, and plaintiff released from the contract a strip of land conveyed under the contract, lying along the line of that in dispute, plaintiff can not claim any benefit from such adverse possession. Following *Graeven v. Dieves*, 68 Wis. 317; 31 N. W. Rep. 914. *Sheppard v. Wilmott* (Wis.), 47 N. W. Rep. 1054; Am. Dig. 1891, 52.

W. purchased a lot, and by mistake inclosed land that his deed did not convey, believing that he was putting his fence on the true line, and held the land thus inclosed as his own for less than the statutory period. W. sold to C. the land he had purchased, following the description in his own deed, and C. went into possession of the whole, and held it as his own long enough to make out the period of limitation by tacking his possession to that of W. W. did not in any way undertake to transfer to C. his possessory right to the parcel so held, and both were ignorant of the mistake in boundaries. *Held*, that there was no privity of estate between W. and C., and their possessions could not be tacked. *Erck v. Church*, 3 Peck. (Tenn.) 575; 11 S. W. Rep. 794 (1889).

Where one who is in possession of a strip of land, together with adjoining land, deeds such adjoining land, and transfers to his grantee possession of the undeeded strip as well as the other, the possession of the grantor may be tacked to that of the grantee, so as to give the latter, at the end of twenty years from the time such possession was first taken, a title by adverse possession. *Faloon v. Simshauser*, 130 Ill. 649; 22 N. E. Rep. 835 (1890).

A defendant who seeks to tack his possession to that of third persons, and thus make out title by continuous adverse possession, must show privity between the third persons and himself. *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264; 6 So. Rep. 837 (1890).

A sheriff's deed, conveying a prior adverse occupant's interest in the land to the succeeding occupant, is not sufficient evidence to establish privity between them, or connect their possessions, because it is not of itself evidence of the sheriff's authority to sell. *Kendrick v. Latham*, 25 Fla. 819; 6 So. Rep. 871.

The possession of the widow before assignment of dower, and that of the deceased husband's heirs, may be tacked to complete the statutory

period of limitation. *Hickman v. Link*, 97 Mo. 482; 10 S. W. Rep. 600 (1889.)

§ 56. **Boundaries or Extent of an Adverse Possession.**—

The extent of the possessions of a person holding adversely under color of title are limited to the land described in the instrument under which he holds, provided the description is correct and sufficiently definite to be ascertained with certainty;¹ otherwise his possessions are limited to the land actually occupied by him.² But where the person in adverse possession is not holding under color of title, but is relying upon a naked possession alone for his title, his possession can not be extended by construction beyond the boundaries of the land actually occupied by him and is adverse only to the extent of his inclosure. In this case the question as to the extent of the possession is frequently one of difficult solution and necessarily depends to a large extent upon the circumstances of each case and the nature and use of the lands in question.³

Illustrations.

Extent of possession: Defendant with her husband entered on 80 acres of wild timber land. He cleared 60 acres (all that was fit for cultivation), inclosed and cultivated it, using the 20 acres uninclosed for wood, rails, etc. After the husband's death the widow and their children continued to occupy it, and use it in the same manner. *Held*, that having acquired title by adverse possession to the 60 acres, she was also entitled to the 20

¹ *Evitts v. Roth*, 61 Tex. 81; ² *Jackson v. Woodruff*, 1 Cow. Leynde v. Williams, 68 Mo. 360; (N. Y.) 276; 13 Am. Dec. 525. *Davis v. Perley*, 60 Calif. 630; *Trebout* ³ *Bristol v. Carroll*, 95 Ill. 84; *v. Daniels*, 38 Iowa, 158; *Barger v. Hamilton v. Wright*, 30 Iowa, 480; *Hobbs*, 67 Ill. 592; *Furlong v. Garrett*, 44 Wis. 111; *Humphreys v. Hoffman*, 33 Ohio St. 395; *Bailey v. Carleton*, 12 N. H. 9; 37 Am. Dec. 190; *Jackway v. Barrett*, 38 Vt. 316; *Robinson v. Phillips*, 65 Barb. (N. Y.) 429; 56 N. Y. 634; *Meade v. Leffing- Ege v. Medar*, 82 Pa. St. 86; *Carker v. Wallis*, 60 Md. 15; 45 Am. Rep. 708; *Creekmur v. Creekmur*, 75 Va. 431; *Core v. Faupel*, 24 W. Va. 238; *Stanton v. Mullis*, 92 N. C. 624; *Veol v. Robinson*, 70 Ga. 809; *Childers v. Calloway*, 76 Ala. 130; *Wilson v. Williams*, 52 Miss. 487; *Hunnicut v. Payton*, 103 U. S. 333. *Hamilton v. Wright*, 30 Iowa, 480; *Alexander v. Polk*, 39 Miss. 737; *Tracy v. Norwich, etc., Co.*, 39 Conn. 382; *Jewett v. Hussey*, 70 Me. 433; *Paine v. Hutchings*, 49 Vt. 314; *Robinson v. Phillips*, 65 Barb. (N. Y.) 429; 56 N. Y. 634; *Meade v. Leffing- well*, 83 Pa. St. 187; *Boynton v. Hodgdon*, 59 N. H. 247; *Scott v. Elkins*, 83 N. C. 424; *Seymour v. Carli*, 31 Minn. 81; *Humphreys v. Huffman*, 33 Ohio St. 395; *Dothard v. Denson*, 75 Ala. 482; *Hammond v. Crosby*, 68 Ga. 767; *Peterson v. McCullough*, 50 Ind. 35.

acres uninclosed. *Mississippi County v. Vowles*, 101 Mo. 225; 14 S. W. Rep. 282.

Where a tract of 1,829 acres is included in an inclosed pasture containing about 50,000 acres, of which all except about 500 acres is owned or leased by one man, who exercises control over all of it except said 500 acres, which are exclusively controlled by others, his possession of the 1,829 acres is adverse. *Talliaferro v. Butler*, 77 Tex. 578; 14 S. W. Rep. 191 (1890).

Where a person claiming title to a tract of 2,029 acres has inclosed 200 acres of the land within an inclosure containing about 3,500 acres, on part of which he resides, he has constructive possession of the entire tract. *Talliaferro v. Butler*, 77 Tex. 578; 14 S. W. Rep. 191 (1890).

In an action to try title to certain land lying west of the true line of defendant's survey, it appeared that defendant's father, through whom defendant claimed, believed that his deed conveyed to him all the land in dispute, and that he claimed to the western line of such disputed strip. Defendant's testimony as to his father's possession of the disputed strip was that his improvements were "near" the west line of the disputed strip. This line was 347 feet west of the true line of defendant's survey. *Held*, that as defendant's title by adverse possession depended on the improvements being within the disputed strip, and this evidence left the exact location uncertain, plaintiff would be granted a new trial. *Porter v. Miller* (Tex.), 14 S. W. Rep. 334; Am. Dig. 1891, 483.

The improvement and adverse possession of part of a 40 acre tract of land, under claim of title to the entire 40, founded upon a written instrument purporting to convey the 40, will, if continued long enough, convey title to the entire 40, either under or independent of the Florida statute of limitations; the fifth section of such statute, providing that where the premises included in the conveyance are divided into lots the possession of one lot shall not be deemed a possession of any other lot, not being applicable, but such 40 constituting a "known lot" within the meaning of the sixth section, providing that where a known lot or single farm has been partly improved, the remainder of the lot shall be deemed to have been occupied, etc. *Kendrick v. Latham*, 25 Fla. 819; 6 So. Rep. 871; Am. Dig. 1890, 50.

Possession resumed by a grantor can not be held to be under color of his original grant, and his claim under the statute of limitations is restricted to the limits of his actual occupation, unless they embrace less than 640 acres, and his title by adverse possession matures before Rev. St. Tex. took effect, in which case he is restricted to 640 acres, including his improvements as occupied. If such title matures after the Revised Statutes took effect, he is restricted to 160 acres, unless a larger area is inclosed. Rev. St. Tex., Art. 3195; *Bullock v. Smith*, 72 Tex. 545; 10 S. W. Rep. 687 (1889).

Three forty-acres tracts having been platted, and lots sold, and the plat afterward canceled, adverse possession of one of the forties, the other two being open and unoccupied, by one who has bought some of the lots from the owners, and acquired color of title under a tax deed to others, and a void tax deed to others, does not extend to lots in the vacant forties covered by his color of title. *Morris v. McClary*, 43 Minn. 346; 46 N. W. Rep. 238 (1890).

A deed, which had been signed sixteen years before, but not acknowledged until within a short time prior to the bringing of an action of trespass

quare clausum, is admissible in evidence, in connection with plaintiff's possession under it, as color of title, to define his boundaries. *McInerny v. Irvin*, 90 Ala. 275; 7 So. Rep. 841 (1890).

Where one has a patent to all unappropriated lands within a certain boundary, possession of certain detached parcels of unappropriated land, separated from the land in dispute by land already appropriated, is not such possession as would extend over all lands unappropriated when the patent issued. *Moses v. Gatcliff* (Ky.), 12 S. W. Rep. 139; Am. Dig. 1889, 39.

Defendant's grantor occupied land near the line of sections 1 and 3 for more than ten years, supposing it to be unsettled, but there was a conflict as to which section his improvements were on. He testified that he always claimed section 1, but it was shown that previous to the conveyance of that section to defendants he had, by several deeds, conveyed all of section 3. *Held*, that defendants took no title to the portion of section 1 not occupied by his improvements, as Pasch. Dig. Tex., Art. 4624, provides that ten years' peaceable possession, without any evidence of title, shall give to the possessor full property in 640 acres, including his improvements. *Snow v. Starr*, 75 Tex. 411; 12 S. W. Rep. 673 (1890).

The fact that a vendee, under a written contract, occasionally cut timber on an additional six acres, which were uninclosed and unimproved, does not give him title by adverse possession, under Code Civil Proc. N. Y., § 370, which provides that the use of uninclosed land for the supply of fuel or of fencing timber is sufficient to constitute adverse possession by one claiming title "founded on a written instrument," the vendee's written contract not covering the six acres. *Weeks v. Martin*, 57 Hun, 589; 10 N. Y. Sup. 656 (1890).

In trespass to try title to land beyond the limits of the boundaries in defendant's deed, in the absence of actual and notorious claim, the plea of ten years' limitation is not good, unless the land has been actually inclosed for that period. *Carley v. Parton*, 75 Tex. 98; 12 S. W. Rep. 950 (1890).

§ 57. A Grantee's Possession Does Not Exceed the Limits of the Grant.—A person who seeks to have the benefit of the adverse possession of his grantor, who he claims had disseized and ousted the true owner, and from whom he desires title by deed, will be bound by the deed, and his claim of adverse possession will be limited to the lands described in the deed, although his grantor may have been in adverse possession of other lands adjoining those mentioned in the deed. The presumption is that the party claiming entered under this deed, and the possession given him by his grantor was only co-extensive with his deed, and was restricted to the premises granted.¹

§ 58. When a Tract Has Been Subdivided into Lots.—Where a quarter section has been subdivided by the occupant and claimant into lots, it is not necessary under the Illinois

¹ *Graeven v. Devies*, 68 Wis. 317; 31 N. W. Rep. 914 (1887); *Sydnor v. Palmer*, 29 Wis. 252.

statute, in order to secure the benefit of the limitation of seven years, that the claimant should have an actual residence on each lot of the subdivision in the sense in which those terms are ordinarily understood, but it is sufficient if he shows an actual residence for the entire period on some one of the lots, claiming the whole under the same title, and that the lot in controversy was and is in the possession of his tenant under his title and pursuant to his claim.¹

A tract of twelve thousand acres was divided into lots and an entry made by L., under a claim of paper title, and actual possession taken of the greater part of the tract. *Held*, no foundation for a constructive possession by L. of a lot not cultivated, nor improved, nor protected by a substantial inclosure, nor used for the supply of fuel or fencing timber for the purposes of husbandry, or the ordinary use of L., or any of his tenants, nor being a portion of any known farm or single lot, partly improved, that has been left not cleared or not inclosed, according to the usual course and custom of the adjoining country. *People v. Livingston*, 8 Barb. (N. Y.) 253.

§ 59. **Fences and Boundary Lines as Indicating a Possession Under the Doctrine of Adverse Possession.**—The owners of adjoining lands may, by parol agreement, settle and permanently establish a boundary line between them, which, when followed by possession, according to the line agreed upon, is binding and conclusive, not only upon the owners but upon their grantees. This is upon the principle, not that the title passes by the parol agreement, but that the extent of the ownership of the land of each party has been agreed upon, settled and determined, and that when acted upon, the parties and their privies are estopped from questioning it as an executed agreement.² When the boundary line is thus agreed upon and followed up by possession according to the line, the possession becomes as a matter of course adverse, and will confer a title by prescription.³ If one in possession of lands,

¹ *Dredge v. Forsyth*, 67 U. S. (2 White v. Hopeman, 43 Mich. 267; 38 Black) 563 (1862); *Gregg v. Tesson*, 1 Am. Rep. 178; *Cole v. Parker*, 70 Mo. Black, 150; *Lender v. Kedder*, 23 Ill. 372; *May v. Rafferty*, 1 Head (Tenn.), 51; *Williams v. Ballance*, 23 Ill. 197; 60; *Brown v. Cockerell*, 33 Ala. 38; *Gregg v. Forsyth*, 24 How. 179. *Irving v. Adler*, 44 Calif. 559; *Faught*

² *Grim et al. v. Murphy*, 110 Ill. v. Holway, 50 Me. 24; *Davis v. 271* (1884); *Cutler v. Callison*, 72 Judge, 46 Vt. 655; *Robinson v. Ill. 113*; see chapter on Boundaries. *Phillips*, 1 T. & C. (N. Y.) 151; *Adams*

³ *Grim v. Murphy*, 110 Ill. 271 (1884); v. Rockwell, 16 Wend. (N. Y.) 285; *Brown v. Leete*, 6 Saw. (U. S.) 332; *Smith v. McKay*, 30 Ohio St. 409; *Sherman v. Kane*, 86 N. Y. 57; *Don-Boston, etc., v. Sparhawk*, 5 Met. ohue v. Thompson, 60 Wis. 500; (Mass.) 469; *Shiels v. Roberts*, 64 Ga. *Heinrichs v. Terroll*, 65 Iowa, 25; 370.

ignorant of the true boundary, makes an error in locating his fence, but makes no claim to the land inclosed by it, his possession of the lands thus inclosed by mistake, will not be adverse because it lacks the essential element of intuition;¹ but if after so inclosing the land by mistake he claims it as his own it will be otherwise, for here is an intention to hold, and such possession will operate as a disseizin.²

Illustrations.

Mistake, etc. : If one by mistake inclose the land of another, and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession as owner for the statutory period will work a disseizin, and his title will be perfect. *Levy v. Yerga*, 25 Neb. 764; 41 N. W. Rep. 773; *Obernálte v. Edgar*, 28 Neb. 70; 44 N. W. Rep. 82 (1890).

The owner of three lots forming a single tract sold one of them to defendant, pointing it out on the ground, and defendant at once took possession of the land so designated, and built a house on it. A deed was made conveying it as lot No. 1, but, owing to incorrect surveys, lot No. 1 was not the land of which defendant had possession, though both parties supposed it was. For more than fifteen years defendant remained in possession, claiming ownership, and during all that time he paid taxes on lot No. 1, but not on the land he in fact occupied. *Held*, that defendant acquired title to the land he actually occupied by adverse possession under the Kansas fifteen year statute of limitations. *Civil Code Kan.*, § 16, subd. 4; *Moore v. Wiley*, 44 Kan. 736; 25 Pac. Rep. 200 (1891).

Where a vendee enters into possession of land under a contract of sale, and remains in possession of the property, as described in the contract, openly, notoriously, and in hostility to all comers, for the period of limitation, he obtains a good title to all the tract, although a few years after the contract and taking possession a deed was made to him the description in which did not include part of the land described in the contract. *Prager v. Stroud*, 130 Pa. St. 401; 18 Atl. Rep. 637 (1890).

A mistake in a deed, whereby a portion of the premises intended to be conveyed is omitted in the description, does not prevent the grantee from

¹*Skinner v. Crawford*, 54 Iowa, 119; *Heickshorn v. Hartwig*, 81 Mo. 648; *Grim v. Murphy*, 110 Ill. 271; *Robinson v. Kinne*, 70 N. Y. 147; *Enfield v. Day*, 7 N. H. 457; *Comegys v. Carley*, 3 Watts (Pa.), 280; *Bicker v. Hibbard*, 73 Me. 105; *Howard v. Rudy*, 29 Ga. 152; *Alexander v. Wheeler*, 69 Ala. 332; 78 Ala. 167; *Irving v. Adler*, 44 Calif. 559.

²*Houx v. Batteen*, 68 Mo. 84; *Schneider v. Botsh*, 90 Ill. 577; *Brown v. Anderson*, 90 Ind. 94; *Bunce v. Bidwell*, 43 Mich. 542; *Sherman v. Kane*, 86 N. Y. 57; *Chance v. Branch*, 58 Tex. 490; *Southmand v. McLaughlin*, 24 N. J. Eq. 181; *Mode v. Lang*, 64 N. C. 433; *Cole v. Parker*, 70 Mo. 372; *Ricker v. Hibbard*, 73 Me. 105; *Enfield v. Day*, 7 N. H. 457; *Saule v. Barlow*, 49 Vt. 329; *Hunter v. Chrisman*, 6 B. Mon. (Ky.) 463; *Meyer v. Weigman*, 45 Iowa, 579; *Tracy v. Newton*, 55 Iowa, 210; *Seymour v. Carli*, 31 Minn. 81; *Swettenham v. Learey*, 18 Hun (N. Y.), 284.

acquiring a title by prescription to the land so intended to be conveyed. *Vandall v. St. Martin*, 42 Minn. 163; 44 N. W. Rep. 525 (1890).

Fences and inclosures: In ejectment, defendant gave evidence that he and his grantor had been in possession of the *locus in quo*, a narrow strip between plaintiff's and defendant's lots, for the statutory period, and had during all that time maintained a board fence around it. *Held*, under Code Civil Proc. N. Y., § 372, providing that a person not claiming under a paper or record title is deemed to be possessed, *inter alia*, where the property "has been protected by a substantial inclosure," that the question of defendant's adverse possession should have been submitted. *Palmer v. Saft*, 21 N. Y. St. Rep. 478; 3 N. Y. Sup. 250 (1889).

The adverse possession must be marked by a substantial inclosure, but that inclosure may be in part natural, as a continued ledge of rocks, a mountain, or navigable river. And where the fence inclosing a lot bounding on a river, was not directly on the margin of the river, but near enough to make it obvious evidence of a claim to the water, and was interrupted in some places where the bank, and the growth upon it, were a sufficient protection from cattle, it was held sufficient. *Jackson v. Halstead*, 5 Cow. (N. Y.) 216.

In an action to recover land claimed by plaintiff on the ground of adverse possession, it appeared that the land lay between plaintiff's house and that of defendant, which, with plaintiff's permission, had been built on what plaintiff testified was the line between the two lots, theretofore marked by a fence; but it did not appear that there was then any dispute as to the land; and there was evidence that the parties mistakenly supposed that the fence marked the line. Plaintiff testified that the front of this strip of land was closed by a door extending from her house to that of defendant; that for more than fifteen years she had had the exclusive use and occupancy of said land, and defendant had never come upon it, except with her permission; that, within a year prior to the suit, plaintiff had built a fence along the line as claimed by her, which was torn down by defendant, who thereupon built a fence inclosing the land sued for. Defendant showed the paper title to the land. It was not shown who had erected the door between the houses. There was evidence that plaintiff had never asserted any claim to the land until she built her fence. *Held*, that a verdict for defendant was warranted. *McDonald v. Fox*, 20 Nev. 364; 22 Pac. Rep. 234.

Upon an exchange of lands between plaintiff's grantor and defendant's father, the latter told the former to inclose a "good acre," which he did by building a fence around it, at the same time receiving a memorandum reciting that he was entitled to a deed for an acre, "more or less." Shortly afterward the latter conveyed his whole tract to defendant. Defendant and plaintiff's grantor then measured the land inclosed, and found it to contain eight rods over an acre, when defendant said, "take it all," and gave a deed in accordance with the memorandum. Defendant afterward had a survey made, by which he claimed it was shown that the corner of his tract was further east than was supposed at the time of the measurement, and the part in dispute was a strip eight rods long, seven feet wide at one end, and about fourteen at the other. Plaintiff and his grantor were in possession more than ten years. *Held*, their possession was adverse as to

the whole amount inclosed, and plaintiff could maintain trespass against defendant. *Wilson v. Gunning*, 80 Iowa, 331; 45 N. W. Rep. 920 (1890).

One who, having purchased vacant and unoccupied land in good faith at tax sale, and obtained a tax deed for it, pays taxes thereon for seven successive years, acquires such a possession by erecting a fence around it as will bring him within Rev. St. Ill., c. 83, § 7, providing that a person having color of title, made in good faith, to vacant and unoccupied land, and paying all taxes thereon for seven successive years, shall be deemed the legal owner, according to the purport of his paper title. *Gage v. Hampton*, 127 Ill. 87; 20 N. E. Rep. 12.

The original owner, who afterward finds a part of the fence destroyed, acquires no additional rights by refencing the property. *Id.*

There must be a real, substantial inclosure, an actual occupancy, a *possession pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defense, and is to countervail the legal title. A fence, made by felling trees and lapping them one upon another around the land, is not sufficient. *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230.

Where a grantee of land believes that his grant includes a lot adjacent thereto, and therefore incloses the latter within his general fence, and henceforth continuously cultivates such lot from year to year for more than twenty years, he acquires title thereto by adverse possession. *Brown v. Morgan*, 44 Minn. 432; 46 N. W. Rep. 913 (1890).

Proof that plaintiffs and those under whom they claim had been in continued and uninterrupted possession of the premises in question from 1831 until the commencement of the action in 1887, and that the premises were inclosed by a substantial inclosure from 1831 until 1852, is sufficient to support a claim of adverse possession. *Scholle v. City of New York*, 53 Hun, 638; 6 N. Y. Sup. 785 (1889).

Question for jury: Where there is some evidence to show that a fence has been maintained for twenty-one years around the land sued for, it is proper to submit the question of adverse possession to the jury, though no one lived on the land during that time, and it was not cultivated continuously. *Thompson v. Philadelphia & R. Coal & Iron Co.*, 133 Pa. St. 46; 19 Atl. Rep. 346.

Boundaries: One can not acquire title to land by adverse possession where he claims title under a deed which in fact does not include such land in its description. *Casey v. Dunn*, 29 N. Y. St. Rep. 355; 8 N. Y. Sup. 305 (1890). —

The adverse possession of land by a grantor can not avail his grantee, beyond the boundary line described in the deed. *Jenkins v. Trager*, 40 Fed. Rep. 726.

A description of land in a bond for title as the residue of the tract sold by W. to D., and not previously conveyed by D. to sundry persons, is so vague and indefinite that title by possession can not be based thereon, in the absence of evidence identifying the boundaries of the "residue." *Davis v. Stroud*, 104 N. C. 484; 10 S. E. Rep. 666 (1890).

Where a boundary line was in dispute, which the lessor claimed to have run according to a deed, under which both parties held, so as to cut off part of defendant's premises, the latter was permitted to show a possession

by himself of that part, adversely to any other claim, for thirty-six years, and a recognition by the lessor of the existing boundary. *Jackson v. Bowen*, 1 Cai. (N. Y.) 358.

The possession of a tenant beyond the boundaries of the land contained in his lease can not be regarded as the possession of his landlord, where the latter never had possession of the land, or claimed title to it, even though the tenant believes that he is occupying only the land demised. *Holmes v. Turner's Falls Lumber Co.*, 150 Mass. 535; 23 N. E. Rep. 305 (1890).

The fact that plaintiff's vendor and defendant once agreed to establish a line with reference to the land in controversy, but never executed the agreement, does not affect plaintiff's rights. *Evans v. Foster*, 79 Tex. 48; 15 S. W. Rep. 170 (1891).

Where the line between adjoining owners is in doubt, but they only claim ownership to the true line, wherever that may be, no title by adverse possession can arise in either, as against the other. *Krider v. Milner*, 99 Mo. 145; 12 S. W. Rep. 461.

§ 60. **What Are Inclosures, Fences, etc.**—While the general rule of law requires that the fence by which lands are inclosed should be of a substantial and permanent nature, its character must always to some extent be governed by the nature of the lands to be inclosed.¹ It has been held that the fences must be erected by the party claiming adversely, though one erected by an adjoining owner, if on the boundary line, may be sufficient.² All inclosures must be entire and complete, and for the purpose of marking the boundaries of the lands in adverse possession,³ fences must be substantial. A mere brush fence, or one made by felling trees, so that one laps upon another, will not do.⁴ But of course what has been said here as to inclosures and fences applies to cases where they are relied upon alone as showing acts of occupancy. It should also be borne in mind that there may be in law a sufficient inclosure of lands without any artificial fence at all.⁵ Rivers, mountains, ledges of rocks on one side forming natural barriers, the other sides being inclosed, have been held to form

¹ *Slater v. Jepherson*, 6 Cush. ² *Soule v. Barlow*, 48 Vt. 132; *Morrison v. Chapin*, 97 Mass. 72; *Pope v. Pick*, (Mass.) 224; *Stephens v. Hollister*, 18 Vt. 294; 46 Am. Dec. 154; Y. 24; see *Kere v. Hill*, 75 Ill. 51.

Hale v. Glidden, 10 N. H. 397; *Lane v. Gould*, 10 Barb. (N. Y.) 254; *Slater v. Jepherson*, 6 Cush. (Mass.) 397; *O'Hara v. Richardson*, 46 Pa. St. 291; 129; *Jackson v. Schoonmaker*, 2 Hutton v. Shumaker, 21 Calif. 453; *Johns*, (N. Y.) 229.

Borel v. Rollins, 30 Calif. 408.

⁵ *Becker v. Van Valkenburg*, 29

² *Doolittle v. Tice*, 41 Barb. (N. Y.) 319.
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inclosures which will, with claim of title, constitute an adverse possession.¹ The question as to whether the lands in controversy are held adversely is to be decided upon the sufficiency of all the acts and circumstances of the particular case in evidence and without reference to the insufficiency of any one or more of them.

§ 61. **The Inclosure Need Not Be Continuous.**—The law requiring that lands held in adverse possession shall be protected by a substantial inclosure if construed to require a continuous, uninterrupted inclosure for periods required by the statute would in many cases make it impossible to acquire title by adverse possession upon such a construction; if fences are carried away by floods, destroyed by fire, taken down in winter for the accommodation of travel, or removed to prevent them from being swept away by ice and tides, the adverse possession would cease, although they were restored as soon as the circumstances permitted. The statute must have a reasonable construction, and interruptions of this kind do not in law affect the possession of the occupant.²

§ 62. **When Possession Is Not Adverse.**—Possession can not be adverse if held under a superior title or inconsistent with the estate of the person in possession. The cases involving the question under consideration may be divided into two classes:

(1) Where the occupant is in possession under some superior title, so that his possession is the possession of the owner of the superior title.

(2) When the estate of the occupant and the estate of some other person out of possession form different parts of one and the same estate.

But such possession, though not adverse in its inception, may nevertheless become so when the occupant intentionally commits some act which in law amounts to an ouster or a denial of the right or title of the person under whom he holds. Under the first class of these relations, which we shall presently discuss, naturally fall the relations of vendor and vendee of lands

¹ Jackson v. Halstead, 5 Cow. (N. Y.) 216; see Pope v. Houmer, 74 N. Y. 240; Becker v. Van Valkenburg, 29 Mo. 593; Brumagin v. Bradshaw, 29 Barb. (N. Y.) 319. ² Trustees v. Kirk, 84 N. Y. 215; 38 Am. Rep. 505; St. Louis v. Gorman, 39 Calif. 24.

under contracts of purchase and otherwise—landlord and tenant, trustee and *cestui que trust* and the like. Under the second class fall tenants in common and the like. In all these relations authorities may be found which maintain the doctrine that the occupant of lands, confessedly in subordination to the title of the real owner, is incapable of changing the character of his possession to an adverse holding by any act of his own, and that in order to deny or dispute the title under which he holds he must first surrender the possession to the person under whom he holds and place him in the same condition in which he was when the possession in question was originally taken. This doctrine was supposed to govern the relations under consideration, and that no lapse of time could lay the foundation for a bar to the right of entry by reason of adverse possession between the parties standing in such relations, or their privies.

The weight of modern authority has settled the law otherwise. The vendee may now disavow the title of his vendor after a breach of the contract under which he holds possession. The trustee may disavow and disclaim his trust. The tenant may deny his landlord's title after the expiration of his lease, and the tenant in common may dispute the title of his co-tenant, and by their acts compel the owner to bring actions of ejectment for the recovery of their estates, within the periods fixed by the statutes of limitations. The only distinction between these cases and those in which no privity between the parties existed when the possession commenced, is in the degree of proof required to establish the adverse character of the possession. In these cases the possession was taken and held in subserviency to the title of the real owner, and a clear, positive and continued disclaimer and disavowal of the title and assertion of an adverse right, to be brought home to the real owners, are indispensable before any foundation can be laid for the operation of the statute of limitations. Otherwise, the grossest injustice might be practiced; for, without such notice, the owner of the land might safely rely upon the relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations. The statute, therefore, does not begin to run until the possession, which was before consistent with the title of the real owner, becomes tortious and wrong-

ful by the acts of the occupant. These acts must be open, continued and notorious, so as to preclude all doubt as to the character of the holding, or the want of knowledge on the part of the owner. If the owner then neglect to enforce his rights by an action within the period fixed by the statute, the loss is attributable to his own *laches*, and not to the law.¹

Land was conveyed in 1854 in trust for a mother and her two children. On the death of the latter, their interests descended to three half-sisters and a daughter of a half-brother. The defendant is the husband of one of the half-sisters. In 1866, the mother deeded her interest to him, and the trustee conveyed him the legal title, both deeds being in trust for his wife and children. Since then he has held possession of the land. The complainants are the children of another of the half-sisters. The defendant held a power of attorney from her to transact her business in the State from the time he took possession until her death in 1867. In 1873, he bought the interests of the other half-sisters and that of the half-brother's daughter. *Held*, that during the life of the complainants' mother, the defendant's possession was not adverse to her. *Day v. Davis*, 64 Miss. 253; 8 So. Rep. 203 (1890).

A tenant at will, with his family, remained in possession of land until his death, and thereafter his widow continued in possession for more than twenty-one years. *Held*, that, as her husband's possession was in subordination to the title of the rightful owners, her continued possession was of the same character, and that, in the absence of evidence that she had renounced the privity between her and the rightful owners, she could not avail herself of the statute of limitations. *Mitchell v. Murphy*, 43 Fed. Rep. 425 (1890).

Where the preponderance of the evidence shows that defendant's ancestor, through whom he derives title, entered upon the land in controversy as tenant of plaintiff's ancestor, and did not renounce his allegiance until shortly before the suit was brought, defendant can not set up title by adverse possession nor dispute the validity of the plaintiff's title. *Miller v. South (Ky.)*, 14 S. W. Rep. 361; Am. Dig. 1891, 56.

First class: Under the first class will be considered the relations of principal and agent, landlord and tenant, trustee and

¹ Tyler on Ejectment, 876; *Osterman v. Baldwin*, 6 Wall. (U. S.) 116; 558; *Public Parks, etc.*, ex parte, 73 *Herman v. Smaltz*, 7 Fed. Rep. 566; N. Y. 560; *Farrish v. Coon*, 40 Calif. 10 *Bissell (U. S.)*, 323; *Walker v. 33; Gassam v. Donaldson*, 18 B. Mon. Crawford, 70 Ala. 567; *Beard v. Ryan*, (Ky.) 230; *Goldcleugh v. Johnson*, 78 Ala. 37; *Moring v. Ables*, 62 Miss. 34 Ark. 312; *Furlong v. Garrett*, 44 263; *Adair v. Adair*, 78 Mo. 630; Wis. 111; *Blackwell v. Ryan*, 21 S. Doe v. Jefferson, 5 Del. 477; *Nowlin C. 112; Den v. Kipp*, 2 Dutch. (N. J.) v. Reynolds, 25 Gratt. (Va.) 137; 351; *Harris v. Richey*, 56 Pa. St. 395; *Hudson v. Putney*, 14 W. Va. 561; *Nords v. Dill*, 11 Ohio, 455; *Elliott v. Williams v. Cash*, 27 Ga. 507; *Jack-Frye*, 62 Ill. 507; *Clouse v. Elliott*, son v. Foster, 12 Johns. (N. Y.) 490; 71 Ind. 302. And see authorities cited *Brown v. King*, 5 Met. (Mass.) 173; later on under sections treating of *Catlin v. Decker*, 38 Conn. 262; these relations under special headings.

cestui que trust, vendor and vendee, mortgagor and mortgagee, and other like relations.

§ 63. **Principal and Agent.**—Like other similar relations the possession of an agent is the possession of his principal. It will not be adverse until there has been an open disclaimer and the assertion of a hostile title and notice thereof to the principal or those claiming under him.¹

§ 64. **Landlord and Tenant.**—As distinguished from tenants in common of lands and tenants for life, the relation of landlord and tenant in the ordinary legal acceptation of the term is another instance where the possession of the occupant is the possession of another, that is, the possession of the tenant is the possession of the landlord. When this relation exists, the possession of the tenant is consistent with the title of the landlord, and the mere neglect of the landlord to demand the rent, or of the tenant to pay the same, is not sufficient to bar the landlord's title, although, if long continued, it may bar the right of the landlord to collect his rents.²

§ 65. **When a Tenant's Holding Becomes Adverse.**—Before the possession of a tenant can become adverse to his landlord he must intentionally do some act equivalent to a surrender of the premises and bring home to his landlord the knowledge of his adverse claim. The tenant may show that the title of his landlord has terminated, either by its original limitation, or by a conveyance to himself of a third person, or by the judgment and operation of law. If the landlord transfers the estate, the allegiance of the tenant is due to the grantee. If the estate is vested in a third person by operation of law, the tenant holds the possession subject to the title of such third person. He may buy in the premises under a judgment against the landlord and set up the title thus acquired in bar of an action against him. In such cases the relation of landlord and tenant is dissolved and the tenant no longer holds under his landlord.³

¹ Fountain, etc., Co. v. Phelps, 95 Ind. 271; Bancum v. George, 65 Ala. 259; Atkinson v. Patterson, 46 Vt. 750; Whiting v. Taylor, 8 Dana (Ky.), 403; Simmons v. Lane, 25 Ga. 178.

² Van Duyn v. Hepner, 45 Ind. 589; Campbell v. Shipley, 41 Md. 81; Whitney v. Edmonds, 94 N. Y. 309; Catlin v. Decker, 38 Conn. 262; Dothard v. Denson, 72 Ala. 541; Abbey, etc., Asso. v. Miliard, 48 Col. 614.

³ Tilghman v. Little, 13 Ill. 239 (1851); Jackson v. Doris, 5 Cow. (N. Y.) 123; England v. Slade, 4 D. & E. (Eng.) 682; Jackson v. Rowland, 6

Illustrations.

Landlord and tenant: V., the owner of a four-acre tract of land bordering on a stream, which he had leased to another, purchased a one-acre tract on the opposite side of the stream. After the purchase, the lessee or his grantees erected a mill on, and occupied the one-acre tract, but no written lease thereof was made, nor did it appear by what right he or they so occupied. The subsequent occupants of both tracts paid an amount of rent which was the sum previously fixed for the four-acre tract, but no agreement to pay rent for the other tract was shown. Defendant purchased both tracts under a quit-claim deed from the last occupant, but prior thereto V.'s agents informed him that V. had no title or claim to the mill property. One of the agents told defendant's grantor, when asked concerning rumored claims, that he wanted the money which he had "allowed" on the mill property. The grantor told him that defendant was about to purchase it of him, and defendant said that his grantor gave him a receipt for the money from the agent. After defendant had occupied for a time in excess of the period of limitations, V. conveyed both tracts to plaintiff. *Held*, as the existence of the relation of landlord and tenant between defendant's grantor and V. was not shown as to the one-acre tract, that defendant had acquired title by adverse possession, and the conveyance was void for champerty. *Becker v. Church*, 115 N. Y. 562; 22 N. E. Rep. 748 (1890).

Code Civil Proc. N. Y., § 373, provides that the possession of the tenant is the possession of the landlord till the expiration of twenty years after the termination of the lease, or, where the lease is not in writing, twenty years after the last payment of rent. 1 Rev. St., p. 739, § 147, declares that "every grant of lands shall be absolutely void if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." In an action of ejectment it appeared that defendants were put in possession by a warranty deed from one B., who had paid rent the year before, and they continued in possession for twenty-one years, when the owner of the fee conveyed to plaintiff, who demanded and received rent from B. without the knowledge of defendants, who had never paid rent. *Held*, that the payment of rents by B. did not affect the title of defendants, and that, as against them, the conveyance to plaintiff was absolutely void. *Church v. Schoonmaker*, 115 N. Y. 570; 22 N. E. Rep. 575 (1890).

Plaintiff owned the lot in controversy, but it was assessed to defendant, who had no interest in it, and sold for taxes. Defendant acquired the tax title, but did not go into possession. The lot when sold was in posses-

Wend. (N. Y.) 666; *Gregory's Heirs v. Hawley*, 39 Vt. 534; *Avery v. Bauer*, Crabb's Heirs, 2 B. Mon. (Ky.) 234; *Wright (O.)*, 576; *Wild v. Serpell*, 10 Nellis v. Lathrop, 22 Wend. (N. Y.) Gratt. (Va.) 400; *Boyer v. Smith*, 3 121; *Blight, etc., v. Rochester*, 7 Watts (Pa.) 449; *Catlin v. Decker*, Wheat. (U. S.) 535; *Whiting v.* 38 Conn. 362; *Campean v. Lafferty*, Edmunds, 94 N. Y. 309; *Estes v.* 50 Mich. 114; *Willison v. Watkins*, 3 Long, 71 Mo. 605; *Lunsford v. Turner*, Pet. (U. S.) 43; *Creekmur v. Creek-* 5 J. J. Marsh. (Ky.) 104; *Thayer v. mur*, 75 Va. 430; *Wells v. Sheerer*, 78 Society, etc., 20 Pa. St. 62; *Towne Ala. 142*; *Weichselbaum v. Curlett*, v. Butterfield, 97 Mass. 105; *Holley v.* 20 Kan. 709.

sion of plaintiff's tenant. When defendant acquired title, he went to the tenant of the lot, who was then paying rent to plaintiff, and told him that he owned the lot and would lease it. The tenant said "All right" to defendant's offer to lease the lot, in consideration of the tenant's looking after the fences. He continued to pay rent to plaintiff, however. This possession of the tenant continued for five years after the statute had commenced to run against the tax deed. *Held*, that the tenant was plaintiff's tenant, and that his five years' possession barred defendant's tax title. *Clifton Heights Land Co. v. Randell* (Iowa), 47 N. W. Rep. 905; Am. Dig. 1891, 56.

The tenant of a lot erected a building, the wall of which encroached on an adjoining lot. On the expiration of the lease the landlord executed a new one, which mentioned the building as a part of the leased premises. Thereafter the building was continuously occupied for twenty years by tenants of the landlord, and by those of his heirs and their grantees. *Held*, that the landlord's adverse possession of the ground covered by the wall commenced as soon, at least, as the tenant entered under the new lease, and that the possession was continuous. *Ramsey v. Glenn*y, 45 Minn. 401; 48 N. W. Rep. 322 (1891).

A person can not acquire title by adverse possession against a landlord while living with the tenant, and assisting in paying the rent. *Hodgkin v. McVeigh*, 86 Va. 751; 10 S. E. Rep. 1065 (1890).

A person who, while in the possession of land, accepts a lease therefor from one claiming to be the owner, may, after his term expires, by disclaimer and notice to such person, terminate his tenancy; and he will not, in such case, be required to surrender the possession before he will be allowed to set up an adverse title in himself, or a third person. *Voss v. King*, 33 W. Va. 236; 10 S. E. Rep. 402 (1890).

Possession under a "tax lease" is not, during the lease, adverse to the owner in fee, and it is immaterial that the lease was void for irregularities in the tax proceedings. *Doherty v. Matsell*, 119 N. Y. 646; 23 N. E. Rep. 994 (1890).

§ 66. The Rule Applies to all Persons Holding Under Tenants—Sub-lessees.—The rule of law which precludes a tenant from setting up the statutes of limitations to bar his landlord's title applies equally to all persons who in any manner, immediately or remotely, derive their possession from such tenant. It is a presumption of law in these cases that the possession is in accordance with the title and such presumption will prevail until overcome by proof of some unequivocal and notorious act of exclusion.¹

¹ *Catlin v. Decker*, 38 Conn. 262; *ard v. Denson*, 72 Ala. 541; *Morse v. Wells v. Sheerer*, 78 Ala. 142; *Camp-Byam*, 55 Mich. 594; *Thompson v. bell v. Shipley*, 41 Md. 81; *Sands v. Felton*, 54 Calif. 547; *Reed v. Allen*, Hughes, 53 N. Y. 287; *Whiting v.* 63 Tex. 154; *Thompkins v. Snow*, 63 Edmonds, 94 N. Y. 309; *Abbey, etc.*, Barb. (N. Y.) 525; *Haynes v. Board-Ass'n v. Williard*, 48 Cal. 614; *Van man*, 119 Mass. 414. *Duyn v. Hepner*, 45 Ind. 589; *Doth-*

§ 67. The Tenant Can Not Dispute His Landlord's Title.

—It is an undoubted principle of law that a tenant or one claiming under him is estopped from denying or controverting the title of the landlord, either by setting up title in himself or in a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them and operates in its full force to prevent the tenant from violating the contract by which he obtains and holds the possession. He can not change the nature of the tenancy by his own act merely so as to enable him to hold it against his landlord, who reposes under the security of the tenancy, believing the possession to be that of his own, held under his title and ready to be surrendered by its termination, by the lapse of time or demand of possession.¹ The same principle applies to a mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title.²

§ 68. **Trustee and Cestui Que Trust.**—Trusts as considered in this section will be treated under two heads: (1) Express trusts and (2) implied, constructive or resulting trusts. An express trust is one which is created in express terms in a written instrument. An implied, constructive or resulting trust is one which, without being expressed in writing, is deducible from the nature of the transaction, as when, by the wrongful act of one person, the party affected thereby may charge him in equity as a trustee.³ With regard to express trusts the possession of the trustee is always considered in law the possession of him for whom the trust is holden, or, as he is usually termed in the books, the *cestui que trust*, and this pos-

¹ Baldwin, J., in *Willison v. Watkins*, 3 Pet. (U. S.) 47 (1830); *Sands v. Hughes*, 53 N. Y. 286; *Robertson v. Car.* & P. 208; *Doe v. Austin*, 2 M. Pickereil, 109 U. S. 608 (1883); *Jackson v. Whedon*, 1 E. D. Smith (N. Y.), 141; *Ingraham v. Baldwin*, 9 N. Y. 45; *Perry v. House*, Holt, 489; *Jew v. Wood*, 1 Craig & P. 185; *Hall v. Butler*, 2 Per. & D. 374; 10 Ad. & Peters (U. S.), 1.

² *Willison v. Watkins*, 3 Pet. (U. S.) 760; *Agar v. Young*, 1 Car. & M. 52 (1830); *Kane v. Bloodgood*, 7 Johns. 78; *Storer v. Stiner*, 30 How. Pr. (N. Ch. (N. Y.) 122 (1823).

³ *Bouvier's Law Dic.* 607.

session can not become adverse until the trustee has committed some open and notoriously unequivocal act amounting to a denial of the right of the *cestui que trust*.¹ But in relation to implied, constructive or resulting trusts, the rule is very different. Here, if the person who could have the trust declared in equity knowingly lies by until the statutory period has elapsed, his claim will be barred. The possession of the person upon whom the trust could be charged will be adverse within the meaning of the statute of limitations from the time the knowledge is brought to the other party.² From this rule, however, must be excepted those who are

¹Kennedy v. Kennedy, 25 Kan. 151; Lewis v. Hawkins, 23 Wall. (U. S.) 119; Seymour v. Freer, 8 Wall. (U. S.) 202; Prevost v. Gratz, 6 Wheat. (U. S.) 481; Norris' Appeal, 71 Pa. St. 106; Jones v. Thockmorton, 57 Cal. 368; Catlin v. Decker, 38 Conn. 262; Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190; 8 Am. Dec. 478; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 125; Whiteside v. Jackson, 1 Wend. (N. Y.) 418; Milner v. Hayland, 77 Ind. 458; McCammon v. Pettitt, 3 Sneed (Tenn.), 242; Shelby v. Shelby, Cooke (Tenn.), 179; 5 Am. Dec. 686; Hamilton v. Taylor, 1 Litt. Sel. Cas. (Ky.) 444; Weaver v. Leiman, 52 Md. 708; Gordon v. Small, 53 Md. 550; Butler v. Lawson, 72 Mo. 227; Goodwin v. Goodwin, 69 Mo. 617; McCarthy v. McCarthy, 74 Ala. 546; Williams v. First Pres. Soc., 1 Ohio St. 478; Miller v. Bingham, 1 Ired. Eq. (N. C.) 423; 36 Am. Dec. 58; Edwards v. University, 1 D. & B. Eq. (N. C.) 325; 30 Am. Dec. 170; Taylor v. Dawson, 3 Jones Eq. (N. C.) 86. A trustee can not acquire title by limitation as against his *cestui que trust* where there has been no disclaimer of the trust. Wren v. Followell, 52 Ark. 76; 12 S. W. 155 (1889). Property having been held by trustees under a trust void for uncertainty, not for the use of them-

selves, but for the use of a society which is incapable of taking title to it, no lapse of time will bar the right of the beneficial owners. Heiskell v. Trout, 31 W. Va. 810; 8 S. E. Rep. 557 (1889).

²Willison v. Watkins, 3 Pet. (U. S.) 43; Sherwood v. Sutton, 5 Mason (U. S.), 1; Boone v. Chiles, 10 Pet. (U. S.) 177, 223; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 120; 11 Am. Dec. 417; Phalen v. Clark, 19 Conn. 421; Clark v. Snodgrass, 66 Ala. 233; Peters v. Jones, 35 Iowa, 512; Weaver v. Leiman, 52 Md. 708; Murdock v. Hughes, 7 S. & M. (Miss.) 219; Starke v. Starke, 3 Rich. (S. C.) 438. A trustee under a deed purchased by parol the interest of his daughter, one of the beneficiaries, for two slaves, of whom she at once took control, he beginning to claim her interest in the land. He sold the entire tract by parol to one who held and improved it for two years, using it as his own, and then surrendered it to the father, the daughter having knowledge of the transaction. The father then held it, claiming it as his own, until he sold it. Held, an open renunciation of the trust, and a notorious adverse claim which set the statute of limitations running. Hall v. Ditto (Ky.), 12 S. W. Rep. 941 (1889); Am. Dig. 1890, 46.

innocently ignorant of their rights and those laboring under the disabilities of infancy and the like.¹

Tenants in common of land conveyed it by a deed absolute in form to a trustee, who executed a declaration of trust, reciting the interest of each tenant in the land. A second trustee who was substituted executed a declaration of trust from which the name of plaintiff, a tenant in common, was omitted. *Held* that, as plaintiff was ignorant of the omission of his name from the second declaration of trust, and of the conveyance to the substituted trustee, the possession of the substituted trustee, who was also plaintiff's co-tenant, must be deemed to have been for his benefit; and hence Code Civil Proc. Cal., § 319, which provides that plaintiff in an action affecting the title to land must have been in possession thereof within five years of bringing the action, and section 322, which provides that the possession of land by one entering under a written instrument purporting to convey it shall be deemed to be adverse, have no application in a suit by plaintiff to recover his interest which had been bought from a co-tenant by the second trustee. *Watson v. Sutro*, 86 Calif. 500; 24 Pac. Rep. 172; 25 Pac. Rep. 64 (1890).

§ 69. **To Whom This Rule Applies.**—The rule that the statute of limitations is not a bar to a trust estate applies only to the parties, that is, to and as between the trustee and the *cestui que trust*. It does not apply as between the trustee or *cestui que trust*, and third persons or strangers.²

§ 70. **Vendor and Vendee.**—A vendee under a contract of purchase taking possession of the lands mentioned in his contract of purchase holds the same in subordination to the title of his vendor. Like all other persons in similar relations his possession does not become adverse to his vendor until he has committed some act of notorious and open hostility to the right and title of his vendor, and of which his vendor has notice,³ in such cases the contract being made in contempla-

¹ *Cummings v. Stovell*, 6 Lea Walker, 3 Met. (Ky.) 65; 77 Am. Dec. (Tenn.), 679; *Strunpfer v. Roberts*, 18 164; *Herndon v. Pratt*, 6 Jones Eq. Pa. St. 383; 57 Am. Dec. 606; *Browner v. Staup*, 21 Md. 337; *Groves v. Ala.* 233. *Groves*, 57 Miss. 658.

³ *Hermans v. Schmaltz*, 7 Fed. Rep.

² *Meeks v. Vassault*, 3 Sawy. (U. S.) 566; 10 Bissell (U. S.), 323; *Osterman S.* 206; *Elmendorf v. Taylor*, 10 v. Baldwin, 6 Wall. (U. S.) 116; *Far Wheat*. (U. S.) 152; *Fleming v. rish v. Coon*, 40 Calif. 33; *Walker v. Gilmer*, 35 Ala. 62; *Mason v. Mason*, Crawford, 70 Ala. 567; *Moring v. 33 Ga.* 345; *Crook v. Glenn*, 30 Md. 55; *Ables*, 62 Miss. 263; *Adair v. Adair*, 78 Mo. 630; *Nowlin v. Reynolds*, 25 v. Eastlering, 4 Rich. (S. C.) 101; *Gratt.* (Va.) 187; *Core v. Faupel*, Williams v. Otey, 8 Humph. (Tenn.) 24 W. Va. 238; *Williams v. Cash*, 563; 47 Am. Dec. 632; *Coleman v. 27 Ga.* 507; *Brown v. King*, 5 Met.

tion of a conveyance of the premises to the vendee upon his performance of its conditions on his part to be performed, and when so performed the character of the possession is changed as well as the relations of the parties. The vendee becomes the owner of the title in equity and the possession becomes adverse in the fullest acceptation of the term. The vendor being the owner of the legal title is not entitled to recover the possession of the land and may be compelled to surrender the legal title to the vendee.¹

§ 71. **Rights of Purchasers Under the Vendee, etc.**—Where the vendee, under a contract for the purchase of lands, being in possession, not having paid the purchase money nor received a deed for the same, conveys the lands to a third person on receipt of a stipulated price from him as purchase money, and surrenders the possession to him, such possession in the third person so purchasing is adverse to the original vendor and will ripen into a title under the statute of limitations, although the person from whom his purchase was made never acquired any title or paid the purchaser to the original vendor.²

§ 72. **Mortgagor's Possession, When Adverse.**—The possession of a mortgagor is in general the possession of the mortgagee. In order to apply the doctrines of adverse possession to him to bar an action of ejectment, there must not only be

(Mass.) 173; Catlin v. Decker, 38 Conn. 262; Adams v. Fullom, 43 Vt. 592; 47 Vt. 558; Public Parks Dept. ex parte, 73 N. Y. 560; Turner v. Thomas, 13 Bush (Ky.), 518; Coldcleugh v. Johnson, 34 Ark. 312; Furlong v. Garrett, 44 Wis. 111; Blackwell v. Ryan, 21 S. C. 112; Clouse v. Elliott, 71 Ind. 302; Woods v. Dill, 11 Ohio, 455; Harris v. Richey, 56 Pa. St. 395; Den v. Kipp, 2 Dutch. (N. J.) 351. Where a purchaser enters into the possession of land under an executory contract which leaves the legal title in his vendor, and contemplates a further conveyance of the complete title, such entry will not ripen into an adverse possession under the statute of limitations. Anderson v. McCormick, 18 Or. 301; 22 Pac.

Rep. 1062 (1890). The possession of the vendee under a contract which is not performed is, in effect, the possession of the vendor, and is available to the vendor in making out the statutory period of adverse possession. Mabary v. Dollarhide, 98 Mo. 198; 11 S. W. Rep. 611 (1889).

¹ Harris v. King, 16 Ark. 122; Catlin v. Decker, 38 Conn. 262; Tillman v. Spaun, 68 Ala. 102; Niles v. Davis, 60 Miss. 750; Brown v. King, 5 Met. (Mass.) 173; Moring v. Ables, 62 Miss. 263; Ridgway v. Holliday, 59 Mo. 444; Rutherford v. Hobbs, 63 Ga. 243. See Core v. Faupel, 24 W. Va. 238.

² Beard v. Ryan, 78 Ala. 37; Hunter v. Parsons, 2 Bailey (S. C.), 59; Walker v. Crawford, 70 Ala. 567; Gladney v. Barton, 51 Miss. 216.

an adverse possession for the required period, but there must be an open and notorious denial of the mortgagee's title. The possession of the mortgagor is not to be deemed adverse until he makes some claim or does some open and notorious act adverse to the rights of the mortgagee and of which he has notice;¹ and where the lands have been sold and conveyed by the mortgagor during the pendency of the lien created by the mortgage, the purchaser is in no better condition than the mortgagor. His occupation of the land as absolute owner will not bar the action by the mortgagee for the recovery.²

Second class: Under the second class will be considered the relations of tenants in common, tenants for life and other like relations.

§ 73. **Tenants in Common.**—The possession of one co-tenant is the possession of all the rest. He holds it for his co-tenant until he is ousted. It is the settled rule of law that the possession of one tenant in common is not ordinarily adverse to his co-tenants.³ But when one tenant in common occupies the common property openly, notoriously and exclusively as the sole owner, improving it and receiving to himself the rents and profits, or exercising over the property such acts of ownership as evidence an intention to ignore the rights of his co-tenants, such acts will amount to a disseizin and his possession will be

¹ *Smith v. Woolfolk*, 115 U. S. 143 (1884); *Birnie v. Main*, 29 Ark. 591; *Coldcleugh v. Johnson*, 34 Ark. 312; *Hardin v. Boyd*, 113 U. S. 756; *Koons v. Steele*, 19 Pa. St. 203; *Palmer v. Eyre*, 17 A. & E. (Eng.) 366; *Hodgdon v. Heidman*, 66 Iowa, 645; *Maxwell v. Hartman*, 50 Wis. 660.

² *Jamison v. Perry*, 38 Iowa, 14; *Maxwell v. Hartman*, 50 Wis. 660; *Crook v. Glenn*, 30 Md. 55; *Parker v. Banks*, 79 N. C. 480; *Ringo v. Woodruff*, 43 Ark. 469; *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Butler v. Douglas*, 1 McCrary (U. S.), 630; *Hughs v. Edwards*, 9 Wheat. (U. S.) 490.

Where a mortgagee's possession is under an arrangement with the mortgagor for him to hold possession of the property and manage it until he should satisfy his claim from the pro-

ceeds, such possession is not adverse until the mortgagee's claim is satisfied, or he asserts an absolute title in himself and gives distinct notice of it to the mortgagor. *McPherson v. Hayward*, 81 Me. 329; 17 Atl. Rep. 164 (1889).

The possession of the mortgagor, in the absence of a distinct repudiation of the mortgage, is not adverse to the mortgagee; and his grantee, who assumes the debt, can not plead title by adverse possession in foreclosure proceedings. *Benton County v. Czarlinsky*, 101 Mo. 275; 14 S. W. Rep. 114 (1890).

³ *Union C. S. Min. Co. v. Taylor*, 100 U. S. (10 Otto) 37 (1879). One tenant in common may oust his cotenant, and hold adversely to him, but it must be by some notorious act

regarded as adverse to his co-tenants from the time they are shown to have knowledge of such acts and claims.¹

Pending the administration of the estate of a decedent, an assignee of the interest of the co-tenant can not acquire title against the other co-tenants by limitation. *In re Grider's Estate*, 81 Cal. 571; 22 Pac. Rep. 908 (1890).

§ 74. Deed by One of Several Tenants as Color of Title.—

A conveyance by one of several tenants in common, which upon its face purports to convey the entire estate, will give color of title if possession is taken thereunder by the grantee claiming title to the whole of the lands conveyed. Such a conveyance will amount to an actual ouster and disseizin of his co-tenants. The possession under it is adverse and will, if continued for the period required by the statute, constitute a bar to the recovery of the premises by the other tenants.²

§ 75. Tenants for Life.—A tenant for life holds one part of an estate and the remainder-man the other; that is, taken

or claim, sufficient to give character to the possession; and a purchase at a sheriff's sale of the co-tenant's interest, though the deed be defective, with her subsequent claim of entire title, is sufficient. *Jackson v. Brink*, 5 Cow. (N. Y.) 483.

¹ *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Clymer v. Dawkins*, 3 How. (U. S.) 674; *Culver v. Rhodes*, 86 N. Y. 348; *Moolsey v. Morse*, 19 Hun (N. Y.), 273; *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Catlin v. Decker*, 38 Conn. 262; *Bellis v. Bellis*, 122 Mass. 414; *Holley v. Hawley*, 39 Vt. 534; *Coleman v. Clements*, 23 Calif. 245; *Unger v. Mooney*, 63 Calif. 586; *Abernathie v. Mining Co.*, 16 Nev. 260; *Challefoux v. Ducharme*, 8 Wis. 287; *Campbell v. Gas Co.*, 84 Mo. 352; *Campau v. Campau*, 44 Mich. 31; *Abercrombie v. Baldwin*, 15 Ala. 363; *Burns v. Byrne*, 45 Iowa, 285; *Young v. Heffner*, 36 Ohio St. 232; *Stevens v. Wait*, 112 Ill. 544; *Manchester v. Doddridge*, 3 Ind. 360; *Foulke v. Bond*, 41 N. J. L. 527; *Neeley v. Neeley*, 79 N. C. 478; *Caper-ton v. Gregory*, 11 Grat. (Va.) 505; *Terrill v. Murray*, 4 Yerg. (Tenn.) 104; *Bennett v. Bullock*, 35 Pa. St.

364; *Covey v. Porter*, 22 W. Va. 121; *Van Bibber v. Frazier*, 17 Md. 436; *Roberts v. Smith*, 21 S. C. 455; *Teal v. Terrell*, 58 Tex. 257; *Squires v. Clark*, 17 Kan. 84.

² *Marcy v. Marcy*, 6 Met. (Mass.) 360; *Kettridge v. Proprietors, etc.*, 17 Pick. (Mass.) 246; *Hodges v. Eddy*, 38 Vt. 327; *Forest v. Jackson*, 56 N. H. 357; *Clark v. Vaughan*, 3 Conn. 191; *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Foulke v. Bond*, 41 N. J. L. 527; *Dikeman v. Parish*, 6 Pa. St. 210; 47 Am. Dec. 455; *Caperton v. Gregory*, 11 Gratt. (Va.) 508; *Covington v. Stewart*, 77 N. C. 148; *Gray v. Bates*, 3 Strobb. (S. C.) 498; *Hart v. Bostwick*, 14 Fla. 162; *Cain v. Furlow*, 47 Ga. 674; *Abercrombie v. Baldwin*, 15 Ala. 363; *Alexander v. Kennedy*, 19 Tex. 488; *Ashley v. Rector*, 20 Ark. 359; *Westminster v. Murphy*, 2 Head (Tenn.), 674; *Campau v. Dubois*, 89 Mich. 274; *Nelson v. Davis*, 35 Ind. 474; *Kinney v. Slattery*, 51 Iowa, 353; *Hinkly v. Green*, 52 Ill. 230; *Lapeyre v. Paul*, 47 Mo. 590; *Aberthine v. Can. Va. M. Co.*, 16 Nev. 260; *Unger v. Mooney*, 63 Calif. 586.

together, they hold different parts of one and the same estate. And therefore the possession of him who holds the life estate can not be adverse to the remainder-man. If the tenant for life conveys the land to a stranger by a deed purporting to convey the whole estate, and the purchaser enters into possession of the premises, his holding can not be adverse to the remainder-man during the life of the tenant, his vendor;¹ after the termination of the life estate, however, his possession may become adverse to the remainder-man.²

§ 76. **Discussion of the Question.**—It is a well settled rule of law, that one claiming in reversion, though he may, if he will, take notice of any disseizin done to the tenant of the particular estate, is yet not obliged so to do, but may wait until his right of entry accrues, upon the death of the tenant for life, and may then enter, how long soever the particular tenant may have been disseized.³ Indeed the reversioner has no means of knowing, with reasonable certainty, whether the party in possession is in by disseizin, or under a title or license from the tenant of the particular estate; and in the latter case he would have no right of entry.⁴ The settled doctrine, both upon authority and upon principle, is that the possession of land by a tenant for life can not be adverse to the remainder-man or reversioner; and, if he conveys to a third person by words purporting to pass the absolute property, the possession of the purchaser is not and can not be, during the continuance of the life estate, adverse to the remainder-man or reversioner, so as to set the statute of limitations running against such remainder-man or reversioner. But after a life estate falls in, the possession will be adverse as to a remainder-man or rever-

¹ Pinckney v. Burrage, 31 N. J. L. 74 Ala. 122; Keith v. Keith, 80 Mo. 21; Gernett v. Lynn, 31 Pa. St. 94; 125.

Poor v. Larabee, 58 Me. 543; Henly v. ² Bradstreet v. Huntington, 5 Pet. Wilson, 77 N. C. 216; McCorry v. (U. S.) 402; Henderson v. Griffin, 5 King, 3 Humph. 267; 39 Am. Dec. Pet. (U. S.) 151; Christie v. Gage, 165; Simmons v. McKay, 5 Bush. 71 N. Y. 189; Hall v. Vandergrift, (Ky.) 31; Nicholson v. Caress, 59 3 Binn. (Pa.) 374; Cheseldine v. Ind. 39; Jones v. Freed, 42 Ark. 357; Brewer, 4 H. & McH. (Md.) 487.

Carpenter v. Denoon, 29 Ohio St. 379; ³ Tilson v. Thompson, 27 Mass. 362; Christie v. Gage, 71 N. Y. 189; Han- Wells v. Prince, 9 Mass. 508; Wal-
son v. Johnson, 62 Md. 25; 50 Am. lingford v. Hearl, 15 Mass. 471.
Rep. 199; Dewey v. McLain, 7 Kan. ⁴ Tilson v. Thompson, 27 Mass. 263.
126; 12 Am. Rep. 418; Pickett v. Pope,

sioner. The reason of the rule first stated is, that the possession of the tenant for life, or his vendee during the continuance of the life tenancy is, in contemplation of law, the possession of the remainder-man or reversioner; and the latter can not, during the life of the person for whose life the life estate is, bring an action against the person in possession under such life tenant to recover possession of the premises. All statutes of limitation are based on the theory of *laches*, and no *laches* can be imputed to one who has no remedy or right of action; and to hold the bar of the statute could run against the title of a person so circumstanced would be subversive of justice, and would be to deprive such person of his estate without his day in court.¹

The title of a life tenant of land in the adverse possession of another, claiming the fee under a foreclosure sale, for the period required by the statute of limitations to bar an action therefor, during all which time the life tenant was under no disability, vests in the person in possession, and the life tenant has, after that time, no interest subject to grant. *Baker v. Oakwood*, 22 N. Y. St. 602; 3 N. Y. Sup. 570 (1888).

By vendee of life tenant: Under Rev. St. Ill., C. 83, § 6, which makes seven years' possession and payment of taxes under color of title constitute good title, one who purchases in good faith from the holder of a tax title, without notice that his vendor owned an estate for life in the land at the time of the tax sale, can by seven years' possession, and payment of taxes even during the life of his vendor, obtain good title as against the reversioner. *Lewis v. Barnhardt*, 43 Fed. Rep. 854 (1890).

§ 77. **Ouster—Burden of Proof.**—To effect an ouster in law under the doctrine of adverse possession, there must be an actual, continued, visible, notorious, distinct and hostile possession; so much so and of such a character that its knowledge must be brought to the owner. The burden of showing the acts and circumstances relied upon to make an alleged ouster effectual, rests upon the party alleging it.²

§ 78. **Ouster—The Question for the Court and Jury.**—The question of what particular facts constitute an ouster in the legal contemplation of the term, is a question of law; but the

¹ *Mettler v. Miller*, 129 Ill. 630; 22 193; *Reaume v. Chambers*, 22 Mo. 36; N. E. Rep. 529; 1 Am. & Eng. Ency. *Giddings v. Smith*, 15 Vt. 344; *Barrett v. Stradl* (Wis.), 41 N. W. Rep. 237; *McCorry v. King's Heirs*, 3 439; and *Orthwein v. Thomas*, 127 Humph. 267; *Mellus v. Snowman*, 21 439; and *Orthwein v. Thomas*, 127 Me. 204; *Meraman's Heirs v. Caldwell's Heirs*, 8 B. Mon. (Ky.) 42; *Con-* ² *Newell v. Woodruff*, 30 Conn. 492; *stantine v. Van Winkle*, 6 Hill (N. Y.), *Van Bibber v. Frazier*, 17 Md. 436.

question as to the existence of the acts and circumstances relied upon to establish the ouster, is a question of fact for the determination of the jury under proper instructions from the court.¹

§ 79. **The Doctrine of Adverse Possession to be Taken Strictly—Tenants in Common.**—One of the cardinal rules which apply to acts of limitation generally, and which has been recognized in the courts of England, and in all other courts where the English rules have been adopted, is, that possession, to give title, must be adverse, and it can not be adverse unless it is hostile to the true title. An entry by a party made on the land of another is, or is not, an ouster of the legal possession according to the intention with which it is done; if made under a claim or color of right adverse to the legal title, it is an ouster; otherwise it is a mere trespass. In legal language, the intention defines the entry and fixes its character. The doctrine of adverse possession is to be taken strictly, and is to be made out by clear and positive proof, every presumption of law being in favor of possession in subordination to the title of the true owner. An entry adverse to the lawful owner is not to be presumed, but must be proved. And to make the possession of a party a bar in the action of ejectment, strict proof is necessary that it was hostile in its inception.² The evidence to sustain an ouster by a co-tenant must be still stronger, because of the peculiar relations of the parties.³

§ 80. **Ouster of Tenants in Common.**—To constitute an ouster of a co-tenant the law requires an actual, continued, open and notorious, distinct, exclusive and hostile possession, and knowledge of such possession must be brought home to

¹ Ewing v. Burnett, 11 Pet. (U. S.) 360; Brandt v. Ogden, 1 Johns. (N. 41; Highstone v. Burdette, 54 Mich. Y.) 156; Jackson v. Sharp, 9 Johns. 329; Clark v. Crego, 47 Barb. (N. Y.) (N. Y.) 163; Jackson v. Parker, 3 599; Gill v. Fauntleroy, 8 B. Mon. Johns. Cas. (N. Y.) 124; Guy v. (Ky.) 177; Washburn v. Cutter, 17 Moffitt, 2 Bibb, 507; McGee v. Morgan, Minn. 361; Carpentier v. Mendenhall, 1 Marsh. 62; Culver v. Rhodes, 87 N. 28 Cal. 484; Horman v. James, 7 S. Y. 348; Prescott v. Nevers, 4 Mason & M. (Miss.) 111; Johnson v. Gorham, (U. S.), 330; Hart v. Gregg, 10 Watts 38 Conn. 513; Cummings v. Wyman, (Penn.), 185.

10 Mass. 465; Blackmore v. Gregg, 2 ³ Forward v. Deetz, 32 Pa. St. 72; W. & S. (Pa.) 182. Bailey v. Trammell, 27 Tex. 328;

² Marcy v. Marcy, 6 Met. (Mass.) Barrett v. Coburn, 3 Met. (Ky.) 518.

the party to be bound thereby.¹ Here the ouster is a question of fact to be determined by a jury from the circumstances of the case in evidence, under proper instructions from the court.²

§ 81. **Sufficiency of the Evidence.**—The evidence to sustain an ouster by a tenant in common of his co-tenant should be stronger than is required to sustain an ordinary adverse possession.³ It must be clear enough to make the intention to hold adversely manifest, and must palpably display such intention.⁴

§ 82. **Notice to the Real Owner.**—In order that the possession in such cases be adverse we have seen that knowledge of the hostile acts relied upon to make it so must be brought home to the real owner; but if the hostile character of the possession is so openly manifested that the observation of the real owner, as a man reasonably careful of his interests, would be sufficient to discover it, he will be deemed to have had notice. For example, the making of lasting and valuable improvements and paying taxes upon the premises, the receiving of the rents and profits and not offering to account for the same, and the like, are circumstances which have been held to indicate a holding adverse to the real owner and the effect upon him is in law the same as if notice had been actually communicated to him. The open and notorious character of the possession is sufficient to charge him with actual notice.⁵

¹ *Zeller v. Eckert*, 4 How. (U. S.) 28 Calif. 484; *Blackmore v. Gregg*, 2 295; *Barr v. Gratz*, 4 Wheat. (U. S.) W. & S.(Pa.) 182; *Harman v. James*, 213; *McClung v. Ross*, 5 Wheat. (U. S.) 7 S. & M. (Miss.) 111; *Purcell v. Wil-*

son, 4 Gratt. (Va.) 16.
² *Forward v. Deetz*, 32 Pa. St. 72; *Bailey v. Trammel*, 27 Tex. 328; *Bar-*
rett v. Coburn, 3 Met. (Ky.) 513.
³ *Culver v. Rhodes*, 87 N. Y. 348;
⁴ *Marcy v. Marcy*, 6 Met. (Mass.) 360;
⁵ *Hart v. Gregg*, 10 Watts (Pa.) 185;
Prescott v. Nevers, 4 Mason (U. S.)

41; *Highstone v. Burdette*, 54 Mich. 330.

⁵ *Unger v. Mooney*, 63 Calif. 586;
 329; *Washburn v. Cutter*, 17 Minn. 49 Am. Rep. 100; *Laraway v. Larue*,
 361; *Johnson v. Gorham*, 38 Conn. 49 Am. Rep. 100; *Laraway v. Larue*,
 513; *Gill v. Fauntleroy*, 8 B. Mon. 63 Iowa, 407; see *Culver v. Rhodes*, 86
 (Ky.) 177; *Clark v. Crego*, 47 Barb. N. Y. 348; *Moore v. Antill*, 53 Iowa,
 (N. Y.) 599; *Cummings v. Wyman*, 612; *Samuel v. Borrowscale*, 104
 10 Mass. 465; *Taylor v. Hill*, 10 Leigh Mass. 207; *Virgin v. Land*, 32 Ga.
 (Va.), 457; *Carpentier v. Mendenhall*, 572; *Key v. Jennings*, 66 Mo. 356;

Illustrations.

To constitute a disseizin of a mortgagee by a mortgagor, or those claiming under him, it must be made known to the mortgagee that the mortgagor or his grantees make some claim adverse to the mortgagee. *Holmes v. Turner's Falls Lumber Co.*, 150 Mass. 535; 23 N. E. Rep. 305 (1890).

Where one enters in subordination to the title of the owner of land, and thereafter leases from one holding adversely to the real owner, in such a notorious manner as to give notice of the character of his possession, it is sufficient to set the statute of limitations in action. *Davis v. Hurst* (Tex.), 14 S. W. Rep. 610; Am. Dig. 1891, 45.

When one enters into possession under a contract of sale, his holding can not be adverse unless its hostility has been manifested by unequivocal acts brought expressly, or by legal implication, to the vendor's knowledge. *Kerns v. Dean*, 77 Cal. 555; 19 Pac. Rep. 817.

A widow, who, after her husband's death, remains in possession of land which he admittedly held subject to a certain lien, is presumed to hold as he did, in the absence of an express disclaimer or an express hostile occupancy, with the knowledge of the lien claimant. *Oury v. Saunders*, 77 Tex. 278; 13 S. W. Rep. 1030 (1890).

Where, by a decree quieting title, and the deed made in pursuance of it, all title and right of possession in defendant was transferred to complainant, no retention of possession by defendant was adverse to the title conveyed, and he could set up no title based upon that possession until he had first given notice of his intention to claim adversely. *Woolworth v. Root*, 40 Fed. Rep. 723 (1890).

Evidence that a lessee executed a quit-claim deed of his interest, and at the same time assigned the lease, subject to the rents and covenants therein contained, warrants the inference that all he intended to convey was his term under the lease; and the fact that he resumed possession of the premises without any reconveyance is not conclusive evidence that he intended then to assert an absolute title to the land, but it must be presumed, in the absence of other proof, that his possession was under the lease, and not adverse. *Doherty v. Matsell*, 119 N. Y. 646; 23 N. E. Rep. 994 (1890).

To rebut the presumption that a lessee or his assigns are holding under the lessor, and to initiate an adverse possession, a surrender of possession, or something equivalent thereto, must be made to the lessor, and knowledge of the adverse claim brought to him. *Bedlow v. New York Floating Dry Dock Co.*, 112 N. Y. 263; 19 N. E. Rep. 800 (1889).

A purchaser at an invalid sale, on foreclosure of a recorded mortgage, having held open and exclusive possession until the expiration of the time to foreclose the mortgage, or to redeem the premises, an action by a devisee of the mortgagor, not a party to the foreclosure, is barred, though he had no actual notice of the mortgage, nor of the adverse possession. *Jellison v. Halloran*, 44 Minn. 199; 46 N. W. Rep. 332 (1890).

In an action for partition it appeared that defendant and her predecessors

Moore v. Thompson, 69 N. C. 120; *v. Singleton*, 42 Calif. 395; *Wing v. Wilson v. Williams*, 52 Miss. 488; *Hall*, 47 Vt. 182; *Bracken v. Jones*, *Alexander v. Polk*, 39 Miss. 737; *Herrbert v. Hanrick*, 16 Ala. 581; *Talbut*

in the title, who had taken possession of the premises in 1861, claiming in good faith under a deed, had from that time on exercised acts of exclusive ownership; had collected the rents, dispossessed tenants, and paid taxes; all of which facts were known to and acquiesced in by plaintiff, who claimed under a deed from one of defendant's predecessors, executed in 1859. *Held*, that the action was barred. *McTeague v. McTeague*, 52 Hun, 611; 5 N. Y. Sup. 130 (1889).

§ 83. **What Acts Will Amount to Constructive Notice.**—Building sheds upon the premises, quarrying rock, erecting lime kilns, cutting wood,¹ taking possession under a deed duly recorded,² or under a title bond, as to a purchaser from the obligor,³ actual possession of the land with the exercise of the usual acts and dominion over it,⁴ and using by a railroad of its roadbed by running trains, etc.,⁵ have been held to be constructive notice to the real owner of the lands that they are being held in adverse possession. But it has been held in Vermont that the question as to whether open occupancy operates as notice to the real owner that such occupancy is adverse depends on the nature and circumstances of the possession.⁶

§ 84. **What is Not Constructive Notice.**—Posting a notice declaring an intention to hold the property, and similar acts, have been held not to amount to constructive notice within the meaning of the law.⁷

§ 85. **Adverse Possession as Between Heirs and Creditors.**—In general the entry of one heir will inure to the benefit of all, and if the entry is made as heir, and without claim of an exclusive title, it will be deemed an entry not adverse to, but in consonance with, the right of the other heirs. But it is as clear, that one heir may disseize his co-heirs, and hold an adverse possession against them, as well as a stranger. And, notwithstanding an entry as heir, the party may, afterward, by disseizin of his co-heirs, acquire an exclusive possession upon which the statute will run. An ouster or disseizin is not, indeed, to be presumed from the mere fact of sole possession, but it may be proved by such

¹ *Moore v. Thompson*, 69 N. C. 120.

² *Forest v. Jackson*, 56 N. H. 357.

³ *Spitter v. Scofield*, 43 Iowa, 571.

⁴ *Talbert v. Singleton*, 42 Calif. 395.

⁵ *Jeffersonville R. Co. v. Cyler*, 60 Ind. 383.

⁶ *Wing v. Hall*, 47 Vt. 182; *Plimpton v. Converse*, 42 Vt. 712; 44 Vt.

158.

⁷ *Lynde v. Williams*, 68 Mo. 360.

possession, accompanied with a notorious claim of an exclusive right. And if such exclusive possession will run against the heirs, it will, by parity of reason, run against the creditors.

For the heirs, *qua* heirs, are in no accurate sense in the estate as trustees of the creditors. They hold in their own right by descent from their ancestor, and take the profits to their own use during their possession; and the most that can be said is, that they hold consistently with the right of the creditors. The creditors, in short, have but a lien on the land, which may be enforced through the instrumentality of the administrator acting under the order of the court.¹

"Deeds conveying the whole property of a person making them, to a woman with whom he cohabited, without any proof of valuable consideration paid by her, she not having means to make such purchases, will be presumed to be void, as against creditors. The statute of limitations does not run in such cases." *Buist v. Smyth, Adm'r, etc.*, 2 Eq. Rep. (Desaussure) 214.

§ 86. **Husband and Wife.**—It has been held that while the marriage relation exists, neither the husband nor the wife can hold the lands of the other in adverse possession,² and it seems also that neither can hold lands in adverse possession against the grantees of the other during the existence of the relation of husband and wife.³ Where the husband rents land and moves upon it in subordination to the owner's title, the wife can not, during coverture, claim the premises adversely to the owner so as to set up the bar of the statute of limitations.*

Illustrations.

Between husband and wife: Land having been deeded to a husband the grantor afterward conveyed it to the wife. Both deeds were duly recorded when made, and the husband and wife lived on the land as a home, the husband cultivating it, and selling the crops in his own name. The wife all the time claimed the land as her own and the husband acquiesced therein. This possession having continued for over ten years after the deed to the wife, a judgment was recovered against the husband and execution levied on the land. *Held*, in a suit by the wife to enjoin its sale, that, though the purchase money may have been paid by the husband, the wife

¹ *Story, J., in Ricard v. Williams*, 7 Wheat. (U. S.) 121 (1822). ³ *Vandervoort v. Gould*, 36 N. Y. 639; *Stephens v. McCormick*, 5 Bush.

² *Veal v. Robinson*, 70 Ga. 809; (Ky.) 181. *Hendricks v. Rassan*, 53 Mich. 575; ⁴ *Frink v. Alsip*, 49 Calif. 103. *First Nat. Bank v. Guerra*, 61 Calif. 169; *Bell v. Bell*, 37 Ala. 536; see *Clark v. Gilbert*, 39 Conn. 94.

had acquired title by adverse possession as against him and his creditors. *Hartman v. Nettles*, 64 Miss. 495; 8 So. Rep. 234 (1890).

By widow: The possession by a widow of land to which she has a right of possession under her dower rights is not adverse to the husband's heirs, though she continued in possession under the erroneous supposition that she was her husband's lawful heir. *Hannon v. Hounihan*, 85 Va. 429; 12 S. E. Rep. 157 (1890).

By husband against wife: Where land is conveyed to a husband and wife jointly, the husband can not acquire title to his wife's interest in the land, by adverse possession. *Berry v. Hall* (Ky.), 11 S. W. Rep. 474; Am. Dig. 1889, 50-51.

§ 87. **Possession Under Color of Title—The Term Defined.**—Color of title differs from title only in externals. The substance of both is the same. Were this not so, if color of title were something intrinsically and substantially less or weaker than title, then the wisdom of the legislature could not be vindicated in applying the same period of limitation to a possession supported by the one as is applied to a possession supported by the other.¹ Color of title is that which in appearance is title, but which in reality is no title at all. It is that which is apparently good title, but which, by reason of some defect not appearing on its face, does not in fact amount to a title.² A person in possession of lands under an instrument which upon its face does not appear to give him any title or right of possession, can not be said to be holding under color of title.³

§ 88. **Color of Title and Claim of Title.**—To constitute a color of title, a party must have a paper title, something in writing purporting on its face to convey the title to the land which defines the extent of the claim. It is immaterial how imperfect the writing may be so that it is a sign, semblance or color of title.⁴ As distinguished from a color of title, a claim of title may exist wholly by parol.⁵

¹ *Thompson v. Cragg*, 24 Tex. 596; *McClellan v. Kellogg*, 17 Ill. 498; *Osterman v. Baldwin*, 73 U. S. (6 Wall.) 116 (1867); *League v. Atchison*, 73 U. S. (6 Wall.) 112 (1867).

² *Seigneuret v. Fahey*, 27 Minn. 60; *McClellan v. Omodt*, 37 Minn. 157; *33 N. W. Rep. 326* (1887); *Swift v. Mulkey*, 17 Ore. 532.

³ *O'Mulcahey v. Florer*, 27 Minn. 449; 8 N. W. Rep. 166.

⁴ *Veal v. Robinson*, 70 Ga. 809;

⁵ *Hamilton v. Wright*, 30 Iowa, 486; *Prevost v. Johnson*, 9 Mart. (La.) 123; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587.

§ 89. **Possession Under Color of Title and Possession Not Under Color of Title—The Difference.**—Where an adverse possession is held under an instrument in writing of some kind, sufficient to constitute a color of title, the extent of the possession is governed by the description of the lands contained in the instrument. Here the holder may in fact actually occupy but a small portion of the lands embraced in the instrument, constituting his color of title, but his possession will be construed to embrace the whole. It is termed in law constructive possession. If the instrument contains no definite and certain description by which the boundaries can be located, of course it can have no such effect. It is then no better than a mere naked possession, or a possession not under color of title.¹ Where an adverse possession is held not under color of title, the extent of the occupancy is limited to the land actually occupied by the holder; it can not be extended by construction.²

Illustrations.

If the claim of title is founded on a deed of writing, possession and improvement of a part of a lot will give a valid, constructive possession of the residue, although not improved, but it is essential to support such constructive possession, that the deed or writing should include within its boundaries the land not occupied and improved. *Jackson v. Camp*, 1 Cow. (N. Y.) 605.

When a usurper enters on land, he acquires possession, inch by inch, of the part which he occupies. The possession of one who shows no title, when the extent of it is not shown to have reached within a mile of the *locus in quo*, can not be considered a possession of it. *Prevost's Heirs v. Johnson*, 9 Martin, 123.

Where the defendant produces no written title, but relies solely on possession with an assertion of title, he can retain so much only as he had under actual improvement and within a substantial inclosure. *Jackson v. Warford*, 7 Wend. (N. Y.) 62.

A naked possession, without right, is adverse only to the extent of actual inclosures. *Hammond v. Warfield*, 2 H. & J. (Md.) 151.

Where a man enters on a tract of appropriated land, without title or color of title, the act of limitations will not protect him beyond his actual inclosures. *Farley et al. v. Lenox*, 8 S. & R. (Pa.) 392; *Davidson's Lessee v. Beaty*, 3 H. & M'H. (Md.) 621.

¹ The only effect of claiming under a deed, or other paper title, is to create a constructive occupation of that portion of the premises described in it which is not actually occupied. If the deed contains no definite and certain boundaries which can be located, marked out and made known it can not have such effect. *Lane v. Gould*, 10 Barb. (N. Y.) 254.

² Continuous possession of land for more than thirty years, under claim of ownership, though without color of title, constitutes title in fee. *Bowen v. Swander*, 121 Ind. 164; 22 N. E. Rep. 725 (1889).

Twenty years' possession, under a vague unsurveyed entry, affords protection, as an adverse possession, only to the extent of the actual close. *Henderson v. Howard's Devises*, 1 Marsh. (Ky.) 26.

Residence is not necessary to make an adverse possession. Land may be inclosed and cultivated without residing on it. And the possession is as much adverse in one case as in the other. *Johnston v. Irwin*, 3 S. & R. (Pa.) 202.

Where the evidence shows that defendant in ejectment has been in adverse possession under claim of title for the statutory period, an instruction that, "unless he had a right to the possession of such lands when he took possession of them, he has no right now; time never makes a wrong right," is erroneous. *Probst v. Trustees of Board of Domestic Missions*, 129 U. S. 182; 9 S. Ct. Rep. 263, 1889.

§ 90. **Requisites of the Paper or Instrument Constituting the Color of Title.**—Any such writing having a grantor and grantee, containing a sufficient description of real property and apt words of conveyance, gives the grantee color of title to the lands described therein, and intended to be conveyed thereby. Such an instrument purports to be a conveyance of the title, and because it does not for some reason have that effect, it passes only the color or semblance of the title. It can make no difference in law whether the instrument fails to pass the absolute title because the grantor had no such title to convey, or because he had no authority in fact or in law, and it is immaterial whether such want of authority appears on the face of the instrument or otherwise. It fails to pass the absolute title because the person conveying had no such title to pass, and therefore it gives the color only of which its effect would otherwise be.¹

Illustrations.

What is color of title: Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, is held to give color of title. *Brooks v. Bruyn*, 35 Ill. 392; *Childs v. Showers*, 18 Iowa, 261.

A writing, in the form of a deed, signed and delivered by a person since deceased, purporting to convey land, though not sealed, probated, or registered as required by law, is sufficient to constitute color of title. *Avent v. Arrington*, 105 N. C. 377; 10 S. E. Rep. 991.

Color of title is that which in appearance is title, but which in reality is no title. *Swift v. Mulkey*, 17 Or. 532; 21 Pac. Rep. 871.

Informalities in the deeds under which plaintiff claims are immaterial, since the deeds are, nevertheless, within the letter of the statute, written

¹ *Munroe v. Merchant*, 28 N. Y. 9; 871; *Hacker v. Horlemus*, 74 Wis. 21; *Brooks v. Bruyn*, 35 Ill. 394; *Swift v.* 41 N. W. Rep. 965. *Mulkey*, 17 Oreg. 532; 21 Pac. Rep.

instruments on which he bases his claim of title and adverse possession. *Hacker v. Horlemus*, 74 Wis. 21; 41 N. W. Rep. 965 (1889).

A deed purporting to convey land is sufficient color of title, even though defectively acknowledged. *Cramer v. Clow* (Iowa), 47 N. W. Rep. 59; Am. Dig. 1891, 58.

A deed, though unregistered, is admissible to show possession thereunder for the period necessary to mature title by adverse possession. *Turner v. Williams* (N. C.), 12 S. E. Rep. 989; Am. Dig. 1891, 59.

A quit-claim deed may constitute color of title. *McDonough v. Jefferson County*, 79 Tex. 535; 15 S. W. Rep. 490 (1891).

The fact that land is the separate property of a married woman does not prevent a deed from her husband becoming color of title. *McDonough v. Jefferson County*, 79 Tex. 535; 15 S. W. Rep. 490 (1891).

A void tax deed may constitute color of title, under the general statute of limitations. *Bartlett v. Kauder*, 97 Mo. 356; 11 S. W. Rep. 67 (1889).

On the trial of an issue of adverse possession, a tax deed, although invalid, is admissible to show color of title. *Ricker v. Butler*, 45 Minn. 545; 48 N. W. Rep. 407 (1891).

A tax deed affords such color of title to one in possession under it as will bring him within the general statute of limitations. *Hunt v. Gray*, 76 Iowa, 268; 41 N. W. Rep. 14 (1889).

Proceedings for condemnation of land instituted by a railroad company in the commissioners' court, even though invalid for irregularities of procedure, constitutes color of title, under which the company can adversely hold the premises. *Mobile & G. R. Co. v. Cogsbill*, 85 Ala. 456; 5 So. 188 (1887).

Land which had been allotted to the deceased owner's widow as dower was sold and conveyed in proceedings instituted by the guardian of the infant heirs. *Held*, that possession under such deed by the purchaser and his grantees for twenty years barred the right of the heirs to the land, though the proceedings under which the guardian's sale was made were invalid, and the widow did not die until the expiration of the twenty years. *Following Iron Co. v. Fullenwider*, 87 Ala. 584; 6 So. Rep. 197; *Lowery v. Davis* (Ala.), 8 So. Rep. 79; Am. Dig. 1891, 59.

Where plaintiff's grandmother, of the same name as plaintiff, conveyed the land in dispute to defendant in 1852, and defendant immediately took possession of it, and remained in exclusive and adverse possession until he conveyed to his co-defendant, in 1885, who occupied it up to the time of bringing his action, the adverse possession must be held to have ripened into a perfect title, even though plaintiff was the real owner, and the grandmother had no title to convey. *O'Donahue v. Creagor*, 117 Ind. 372; 20 N. E. Rep. 267 (1890).

Where an order of sale of the land of a decedent to pay debts is made without service of any process on certain of the devisees, and the sale thereunder purports to be of the entire interest in the land, the deed is color of title against all the devisees. The doctrine of tenancy in common can not be applied to the purchaser in such cases. *McCulloh v. Daniel*, 102 N. C. 529; 9 S. E. Rep. 413 (1889).

Where it appeared that the foreclosure of a deed of trust executed by plaintiff to secure notes payable to defendant was void, because of non-

compliance with the terms of the power, and that the notes were surrendered, marked "Canceled by sale," and that the property passed into defendant's possession, such possession, the deed of trust being still in force, was sufficient to raise the bar of the statute of limitations, against an action of ejectment by the mortgagor. *Priest v. City of St. Louis* (Mo.), 15 S. W. Rep. 989; Am. Dig. 1891, 42.

Where defendant purchased land in good faith, taking a bond for title from one signing as the owner's agent, who had no authority in fact, the bond is a forgery, and is color of title, and seven years' possession thereunder, in good faith, confers a good prescriptive title; Code Ga., § 2683, providing that adverse possession, under written evidence of title for seven years, shall give title by prescription. *Millin v. Stines*, 81 Ga. 655; 8 S. E. Rep. 315.

Where a claim is asserted under a conveyance, which is inadequate to carry the true title, and the grantor of which had no power to pass title to the subject thereof, the claim is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statutes of limitations, other requisites of those statutes being complied with. *Swift v. Mulkey*, 17 Or. 532; 21 P. 871 (1889).

Plaintiff having entered under a deed duly registered, and defendant under a tax deed which is void on its face, the possession of the latter is confined to his actual occupancy, and, notwithstanding the entry of defendant, plaintiff may acquire title by adverse possession to all the land not within the limits of defendant's actual occupancy under Rev. St. Tex. 1879, Art. 3193, limiting to five years actions to recover real estate as against any person having peaceable and adverse possession and cultivating, using or enjoying the land, and paying taxes, if any, and claiming under a deed duly registered. *Claiborne v. Elkins*, 79 Tex. 380; 15 S. W. Rep. 395 (1891).

Where a person claiming under a deed conveying the legal title to land is in possession thereof by occupation, cultivation and inclosure, his possession is *prima facie* exclusive. *Ketchum v. Spurlock* (W. Va.), 12 S. E. Rep. 832; Am. Dig. 1891, 59.

A deed to W., his heirs and assigns, of "all the right of the grantor to the possession and improvements" of the premises in question, and covenanting that he is "lawfully possessed of the premises as they are truly granted," if it do not pass the fee, is a sufficient foundation for an adverse possession. *Jackson v. Waltermire*, 7 Cow. (N. Y.) 353.

Under the laws of Nebraska, a party who has been in the actual, open, notorious, exclusive, adverse possession of real estate for ten years, thereby acquires an absolute title to the same, without regard to color of title, the adverse possession being the essential circumstance establishing the title of the holder, even as against a person disseized. *Omaha & Ft. Land & Trust Co. v. Barrett* (Neb.), 48 N. W. Rep. 967; Am. Dig. 1891, 59.

Under Civil Code La., Art. 3478, providing that he who acquires an immovable in good faith and by a just title prescribes for it in ten years, and article 3479, providing that to acquire ownership by such prescription, one condition shall be a title which shall be legal and sufficient to transfer the property, and articles 2274 and 2440, requiring that a title to effect a transfer must be in writing—good faith and possession alone are not sufficient

to acquire immovable property by the prescription of ten years. *Beer v. Leonard*, 40 La. 845; 5 So. Rep. 257 (1889).

The defendant bought the land in controversy in 1875 from the holder of a tax deed. He fenced the land, cultivated it, and has been in actual and uninterrupted possession since his purchase. The original act of sale and the record thereof having been destroyed, the defendant's vendor gave a deed of renewal, describing the land as in section 12. The description gave as a boundary a certain *coulee*, which does not flow through section 12, but through section 11, in which the land lies. *Held*, that evidence was properly admitted to correct the error, and to show in which township the land lies, and that the defendant was protected by possession as owner, in good faith, under a title translativ of the property. *Gee v. Clark*, 42 La. Ann. 918; 8 So. Rep. 627 (1891).

Under the Texas statute conferring title by five years' possession under deed duly registered and payment of taxes, an uninterrupted possession for the statutory period and payment of taxes is not sufficient, where for more than a year during the time, the deed under which the person then in possession claimed was not registered. *Sorley v. Matlock*, 79 Tex. 304; 15 S. W. Rep. 261 (1891).

What is not color of title: A deed to a tenant in possession from one who has no title to the land is void, and insufficient as a basis for adverse possession. *McRoberts v. Bergman*, 57 Hun, 591; 11 N. Y. Sup. 108 (1890).

The commissioner's deed purported to convey to the husband only the interest acquired by one defendant from the other, and all his interest having been previously conveyed to decedent, and having passed by inheritance to the daughter, nothing passed by the deed. *Orthwein v. Thomas*, 127 Ill. 554; 21 N. E. Rep. 430 (1889).

A deed which contains no description of the land conveyed, except by reference to a sheriff's deed, which has not been recorded, is not sufficient to constitute color of title. *McDonough v. Jefferson County*, 79 Tex. 535; 15 S. W. Rep. 490 (1891).

Where the evidence shows that defendant in ejectment has been in adverse possession under claim of title for the statutory period, an instruction that, "unless he had a right to the possession of such lands when he took possession of them, he has no right now; time never makes a wrong right"—is erroneous. *Probst v. Trustees of Board of Domestic Missions*, 129 U. S. 182; 9 S. Ct. Rep. 263 (1889).

§ 91. Parol Agreements as Color of Title.—While, as a general rule, color of title is founded only upon deeds, instruments and agreements in writing, there are adjudications holding that parol agreements may constitute sufficient color of title.¹

¹ *Rannels v. Rannels*, 52 Mo. 108; (Pa.), 69; *Teabout v. Daniels*, 38 Iowa, 46; *Green v. Kellum*, 23 Pa. St. 254; 62 158; *Baker v. Hole*, 6 Bax. (Tenn.) 46; *Am. Dec.* 333; *McClellan v. Kellogg*, *Niles v. Davis*, 60 Miss. 750; *Magee* 17 Ill. 498; *Cook v. Lang*, 27 Ga. 280; *v. Magee*, 37 Miss. 138; *Gladney v. Hamilton v. Wright*, 30 Iowa, 480; *Barton*, 51 Miss. 216; *Davis v. Bow-Osterman v. Baldwin*, 6 Wall. (U. S.) 55; *man*, 55 Miss. 671. 116; *McCall v. McNealey*, 3 Watts

Illustrations.

"Though the complainant has no written deed or contract to support her claim to the property, she is in under a parol agreement which is good as color of title." *Niles v. Davis*, 60 Miss. 750.

Chief Justice Scates of the Supreme Court of Illinois, said "that *claim and color* of title within the meaning of general statutes of limitation, is the same as fixed and used by the courts, as sufficient to support an adverse possession; that color may be given for title without a deed or writing at all, and commence in trespass; and when founded upon a writing it is not essential that it should show upon its face a *prima facie* title, but it may be good as a foundation for color, however defective." *McClellan v. Kellogg*, 17 Ill. 498 (1856), citing as authority: *La Frambois v. Jackson*, 8 Cow. (N. Y.) 589; *Jackson v. Young*, 1 Johns. (N. Y.) 157; *Smith v. Burtis*, 9 Johns. (N. Y.) 180; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *Jackson v. Newton*, 18 Johns. (N. Y.) 355; *Jackson v. Camp*, 1 Cow. (N. Y.) 605; *Hawk v. Senseman*, 6 S. & R. (Pa.) 21; *Miller v. Shaw*, 7 S. & R. (Pa.), 129; *Bell v. Hartley*, 4 W. & S. (Pa.) 32; *Matson v. Fry*, 1 Watts (Pa.), 433; *Frederick v. Searle*, 5 S. & R. (Pa.) 236; *Boyer v. Benlow*, 10 S. & R. (Pa.) 303; *Dufour v. Camfranc*, 11 Mart. (La.) 715; *Whiteside v. Singleton*, Meigs (Tenn.), 207.

The Illinois statutes of limitation then in force were as follows:

§ 8. *Seven years' limitation*: Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise, or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

§ 9. Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title. All persons holding under such tax payer, by purchase, devise, or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of taxes for the term aforesaid, shall be entitled to the benefit of this section: *Provided, however*, if any person, having a better paper title to said vacant and unoccupied lands, shall, during the said term of seven years, pay the taxes assessed on said land for any one or more years of the said term of seven years, then and in that case such tax payer, his heirs and assigns, shall not be entitled to the benefit of this section.

§ 10. The two preceding sections shall not extend to lands or tenements owned by the United States or this State, nor to school and seminary lands, nor to lands held for the use of religious societies, nor to lands held for any public purpose. Nor shall they extend to lands or tenements when there

shall be an adverse title to such lands or tenements, and the holder of such adverse title is under the age of twenty-one years, insane, imprisoned, *feme covert*, out of the limits of the United States, and in the employment of the United States or of this State: *Provided*, such person shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or, in case of vacant and unoccupied land, shall, within the time last aforesaid, pay to the person or persons who have paid the same, all the taxes, with interest thereon, at the rate of 12 per cent. per annum, that have been paid on said vacant and unimproved land. Revised Statutes Ill. 1845, page 104; Purple's Statutes, 155; Scates T. & B. Statutes, 750; Gross' Statutes, 1868, 101.

The cases cited by the chief justice, while they sustain the doctrine that color of title "when founded upon a writing it is not essential that it should show upon its face a *prima facie* title, but that it may be good as a foundation for color, however defective," do not seem to sustain the doctrine that a parol agreement may constitute a sufficient color of title.

Oral agreements: An oral agreement for the exchange of land, followed by twenty years of open, notorious and exclusive occupation as owner, will ripen into an absolute title, though mutual deeds were never given. *Martin v. Maine Cent. R. Co. (Me.)*, 21 Atl. Rep. 740; *Am. Dig.* 1891, 42.

Possession by a son under the parol agreement of the father to convey under claim and color of right, for more than twenty years, gives him a fee simple; and, where such possession was begun more than twenty years before the father's death, one who subsequently purchases the interests of the other heirs in the land, with knowledge that the son is in possession, has no right to suppose that the son entered into possession as an heir, and owns only an heir's interest. *Wilson v. Campbell*, 119 Ind. 286; 21 N. E. Rep. 893.

Defendant introduced evidence to show that she had settled upon the land in controversy upon the promise of a former owner that she might have it for her own; and that she had continued in actual, open and notorious possession for ten years. *Held*, that an instruction that, if the jury found the facts as defendant claimed, then they should find for defendant, notwithstanding they might believe plaintiff's evidence that, while defendant was in possession, she had expressed a willingness to pay the owner a sum of money for it, was error. *Liggett v. Morgan*, 98 Mo. 39; 11 S. W. Rep. 241 (1889).

Where the evidence, in an action to quiet title, shows that plaintiff entered into possession under an oral contract of division with defendant, and has remained in exclusive and adverse possession for over ten years, a decree quieting his title is proper. *Quinn v. Quinn*, 76 Iowa, 565; 41 N. W. Rep. 316 (1889).

Defendant in ejectment testified that he had moved onto the land in question in ignorance of whose it was, and without color of title, but with the express purpose of acquiring title thereto by adverse possession. It was shown that for more than ten years he was in the open, notorious and exclusive possession of this land, exercising all the usual acts of ownership, but he testified himself that until the expiration of that time he refrained from telling any one that the lots were his. *Held*, that, under Code Civil Proc. Neb., § 6, requiring actions for land to be brought within ten years

after the cause accrued, defendant is entitled to judgment. *Fitzgerald v. Brewster* (Neb.), 47 N. W. Rep. 475; Am. Dig. 1891, 53.

§ 92. **What is Color of Title—A Question of Law.**—What is color of title is a matter of law, and when the facts exhibiting the title are shown the court will determine whether they amount to color of title. But the existence of the facts themselves, without regard to their legal effect and the good faith of the party claiming under such color of title, are purely questions of fact to be settled by the jury the same as other facts in the case.¹

§ 93. **What is Good Faith—A Question of Fact.**—What is color of title is a question of law upon the facts, but what is good faith in a party claiming under such color of title is a question of fact for the jury.²

§ 94. **What Has Been Held to be Color of Title.**—*Deeds:* An unrecorded deed from one in possession of lands under color of title;³ an ancient deed accompanied with possession without proof of its execution;⁴ a deed conveying a life estate;⁵ a deed made by an assumed agent;⁶ a deed by the husband of a life tenant given after her death;⁷ a guardian's deed under a void claim of sale;⁸ an administrator's deed made in good faith but without authority of law;⁹ a deed without a seal;¹⁰ a quit-claim deed which conveys no interest;¹¹ a tax deed;¹² a void tax deed;¹³ a deed of the wife's land, made by the husband and wife, but

¹ *Wright v. Mattison*, 59 U. S. (18 How.) 50; *Woodward v. Blanchard*, 16 Ill. 424. ⁸ *Molton v. Henderson*, 62 Ala. 426.

² *Wright v. Mattison*, 59 U. S. (18 How.) 50; *Lea v. Polk*, 62 U. S. (21 How.) 50; *Green v. Kellum*, 23 Pa. St. 254; 62 Am. Dec. 332; *Wales v. Smith*, 19 Ga. 8; *Hanna v. Renfro*, 32 Miss. 125; *Crispin v. Hannavan*, 50 Mo. 536; *Milikin v. Martin*, 66 Ill. 13; *Gaines v. Sanders*, 87 Mo. 557; *Smith v. Ferguson*, 91 Ill. 304. ⁹ *Crispen v. Hannavan*, 50 Mo. 536; *Livingston v. Pendergast*, 34 N. H. 544.

¹⁰ *Barger v. Hobbs*, 67 Ill. 592; see *Pillow v. Roberts*, 13 How. (U. S.) 472.

¹¹ *Carney v. Higdon*, 50 Ga. 629; *Minott v. Brooks*, 16 N. H. 374; *Swift v. Mulkey*, 14 Oreg. 59.

¹² *Doe v. Clayton* (Ala.), 2 So. Rep. 24.

¹³ *Oglesby v. Hollister*, 76 Calif. 186; 18 Pac. Rep. 146; *Whittlesey v. Hoppenyan*, 72 Wis. 140; 39 N. W. Rep. 355; *Bartlett v. Kauder*, 97 Mo. 356; 11 S. W. Rep. 67.

⁵ *Staton v. Mullis*, 92 N. C. 623.

⁶ *Payne v. Blackshear*, 52 Ga. 637.

⁷ *Forest v. Jackson*, 56 N. H. 357.

void as to the latter by reason of a defective acknowledgment; ¹ a deed, which had been signed sixteen years before, but not acknowledged until within a short time prior to the bringing of an action of trespass *quare clausum*, is admissible in evidence, in connection with plaintiff's possession under it, as color of title, to define his boundaries.²

A mortgagee's deed;³ a deed given under an unconstitutional statute;⁴ a writing in the form of a deed signed and delivered by a person since deceased, purporting to convey land, though not sealed, probated or registered as required by law;⁵ a deed which has been canceled;⁶ a sheriff's deed of land outside of his county;⁷ a forged deed, but only where it is accompanied by actual adverse possession, commenced without notice and in good faith,⁸—have been held to be sufficient color of title where the claim has been made in good faith as required by the law of adverse possession.

Where plaintiff's grandmother, of the same name as plaintiff, conveyed the land in dispute to defendant in 1852, and defendant immediately took possession of it, and remained in exclusive and adverse possession until he conveyed to his co-defendant, in 1885, who occupied it up to the time of bringing this action, the adverse possession must be held to have ripened into a perfect title, even though plaintiff was the real owner, and the grandmother had no title to convey. *O'Donahue v. Creagor*, 117 Ind. 372; 20 N. E. Rep. 267.

Agreements, bonds, etc.: An invalid or void bond for title;⁹ a written agreement to divide lands owned in common, though made by the administrator of one of the parties without an order from the court,¹⁰ have been held to be sufficient color of title upon which to found a defense under the statute of limitations.

Where defendant purchased land in good faith, taking a bond for title from one signing as the owner's agent, who had no authority in fact, the bond is a forgery, and is color of title, and seven years' possession there-

¹ *Ferguson v. Kennedy*, Peck (Tenn.), 321; *Cramer v. Clow* (Iowa), 47 N. W. Rep. 59 (1890).

² *McInerney v. Irvin*, 90 Ala. 275; 7 So. Rep. 841 (1890).

³ *Stevens v. Brooks*, 24 Wis. 326.

⁴ *Fagan v. Rosier*, 68 Ill. 84.

⁵ *Avent v. Arrington*, 105 N. C. 377; 10 S. E. Rep. 991.

⁶ *Hughs v. Israel*, 73 Mo. 547.

⁷ *Beverley v. Burke*, 9 Ga. 440.

⁸ *Parker v. Waycross & F. R. Co.*,

81 Ga. 387; 8 S. E. Rep. 871 (1889).

⁹ *Bell v. Coates*, 56 Miss. 776; see

Stamper v. Griffin, 20 Ga. 312; *Grif-*

fin v. Stamper, 17 Ga. 108.

¹⁰ *Shields v. Lamar*, 58 Ga. 590.

under, in good faith, confers a good prescriptive title; Code Ga., § 2683, providing that adverse possession, under written evidence of title for seven years, shall give title by prescription. *Millen v. Stines*, 81 Ga. 655; 8 S. E. Rep. 315.

Patents, etc.: A void patent¹ or certificate for lands;² a certificate of purchase of swamp land under the California civil code, declaring it "evidence that the holder is the owner of the tract therein described, and entry thereunder in good faith, and using the same for grazing purposes, constitutes constructive possession even if the land is not inclosed,"³ have been held to be sufficient color of title upon which to found a defense under the statute of limitations.

Wills: And so it has been held with a bequest of land under a will;⁴ although the will is only that of a life tenant,⁵ or is merely a paper purporting to be a will and proved many years before,⁶ a probated will devising land held by the testator under claim of adverse possession and payment of taxes for nine years before his death, to his widow and children, who continue in possession and pay taxes, is sufficient color of title in Illinois to establish, after the lapse of seven years, their legal ownership, there being no proof of bad faith.⁷

¹ *Logan v. Jelks*, 34 Ark. 547.

² *Hannibal, etc., R. Co. v. Clarke*, 68 Mo. 371.

³ *Goodwin v. McCabe*, 75 Calif. 584; 17 Pac. Rep. 705. The proprietors of East Jersey patented by metes and bounds a tract of land between the Shark river on the north, and Atlantic ocean on the east, including sedge banks lying opposite thereto in the Shark river. The survey did not include by its eastern line all the land to the ocean; but shortly after the patentee conveyed the land to W. as being "bounded on the north by Shark river, and east by the Atlantic ocean," and W. and his grantee, the complainant, had open and exclusive possession of all the land to the ocean for more than seventy years; and then defendant surveyed and took up from

the proprietors the land lying between the eastern line of the survey on which the patent was based and the ocean, whereupon complainant filed a bill to quiet title against him. *Held*, that complainant's possession of the land in dispute was adverse and under color of title, and that title would be quieted in him. *Ocean Beach Ass'n v. Yard* (N. J.), 20 Atl. Rep. 763; Am. Dig. 1891, 54.

⁴ *Henly v. Wilson*, 81 N. C. 405; see *Green v. Mizelle*, 54 Miss. 220.

⁵ *Evans v. Satterfield*, 1 Murph. (N. C.) 413; see *Teabout v. Daniels*, 38 Iowa, 158; also *Callender v. Sherman*, 5 Ired. (N. C.) 711.

⁶ *McConnell v. McConnell*, 64 N. C. 342.

⁷ *Baldwin v. Ratcliff*, 125 Ill. 376; 17 N. E. Rep. 794.

Under the laws of descent, title by descent¹ and the holding of the heirs of a party who held under claim of title,² have also been held as sufficient.

Under proceedings of courts, officers, etc.—A void decree of court;³ a claim based upon condemnation of lands, where the proceedings are void;⁴ memoranda regularly made by a sheriff in a book kept for that purpose, of a sale of land, the officer being dead, have also been held as sufficient color of title.⁵

§ 95. **Examples—A Sheriff's Deed as Color of Title.**—In Illinois it is not necessary that a sheriff's deed should be preceded by a judgment and precept before it can be used as color of title. The party relying upon it as color of title is not bound to show that the prerequisites of the statute have been complied with. Any deed that purports on its face to convey the title to land is color of title if received by the party in good faith, and it is wholly immaterial whether it is preceded by any valid judgment and execution or precept. It

¹ King v. Rowan, 10 Heisk. (Tenn.) 675.

² Teabout v. Daniels, 38 Iowa, 158.

³ Huls v. Buntin, 47 Ill. 396; Whiteside v. Singleton, Meigs (Tenn.), 207.

⁴ Mississippi, etc., R. Co. v. Devaney, 42 Miss. 555.

⁵ Field v. Boynton, 33 Ga. 239.

Land belonging to the estate of a testator was sold by the administrator by order of court in 1866, the widow becoming the purchaser, and thereafter holding the land under such sale until she sold the same to other parties. *Held*, that though the order of sale may have been void, the deed in pursuance thereof, for which the widow paid a valuable consideration, is sufficient color of title to make her possession, and that of those claiming under her, adverse to the heirs. *Balkham v. Woodstock Iron Co.*, 43 Fed. Rep. 648 (1891). Where an order of sale of the land of a decedent to pay debts is made without service of any process on certain of the devisees, and the sale

thereunder purports to be of the entire interest in the land, the deed is color of title against all the devisees. The doctrine of tenancy in common can not be applied to the purchaser in such case. *McCulloh v. Daniel*, 102 N. C. 529; 9 S. E. Rep. 413 (1889). Proceedings for condemnation of land instituted by a railroad company in the commissioners' court, even though invalid for irregularities of procedure, constituted color of title, under which the company could adversely hold the premises. *Mobile & G. R. Co. v. Cogsbill*, 85 Ala. 456; 5 So. Rep. 188 (1889). Where a person, whose possession of land is permissive in its inception, continues in possession until his death, when the land is sold by the administrator as property of the decedent's estate, and a deed purporting to convey the entire estate is executed, the deed constitutes color of title, and possession under it is adverse. *Woodstock Iron Co. v. Roberts*, 87 Ala. 436; 6 So. Rep. 349 (1889).

has always been held sufficient that the deed purports on its face to convey the title, and is received by the grantee in good faith.¹

Illustrations.

In Georgia, a sheriff's deed is admissible in evidence as color of title, although unaccompanied by the execution under which the property was sold. Considering that the sheriff sold without authority, and this is the most that can be presumed from the absence of the *feri facias*, and that consequently the conveyance was void, still the court held that, if the purchaser took and held possession under the deed, it was good as color of title. *Burkhalter v. Edwards*, 16 Ga. 593.

In North Carolina, a sheriff's deed which recited the execution under which the sheriff sold the land, and it appeared that the execution was tested and signed by the deputy clerk instead of the clerk himself, would inure as color of title, notwithstanding the constitution requires all writs to bear test and be signed by the clerks of the respective courts. *Den v. Putney*, 3 Murph. (N. C.) 562.

In Florida, a sheriff's deed is of itself, or unaccompanied by judgment or execution, a sufficient written instrument upon which to found a claim of title to the premises described therein, and start the running of the statutory period in favor of one entering under it. *Kendrick v. Latham*, 25 Fla. 819; 6 So. Rep. 871; Am. Dig. 1890, 39.

In Illinois, one who, having purchased vacant and unoccupied land in good faith at tax sale, and obtained a tax deed for it, pays taxes thereon for seven successive years, acquires such a possession by erecting a fence around it as will bring him within Rev. St. Ill., C. 83, § 7, providing that a person having color of title, made in good faith, to vacant and unoccupied land, and paying all taxes thereon for seven successive years, shall be deemed the legal owner, according to the purport of his paper title. *Gage v. Hampton*, 127 Ill. 87; 20 N. E. Rep. 12 (1889).

§ 96. **A Tax Deed as Color of Title.**—A tax deed, though void upon its face, is sufficient color of title to support an adverse possession to the property therein described,² while a tax certificate is not.³ The possession under a tax deed which bars a recovery must be continuous, uninterrupted, open, notorious, actual, exclusive and adverse.⁴

Where a tax deed is relied upon only as color of title in support of the

¹ Scott, J., in *Winstanley v. Meacham*, 58 Ill. 97 (1871); *Halloway v. Clark*, 27 Ill. 483; *Dickenson v. Bredon*, 30 Ill. 279; *Hassett v. Ridgely*, 49 Ill. 202. *Calif.* 136; *Whittlesey v. Hoppenyan*, 72 Wis. 140; *Bartlett v. Kauder*, 97 Mo. 356; 11 S. W. Rep. 67.

³ *McKeighan v. Hopkins*, 14 Neb. 364; *Bride v. Watt*, 23 Ill. 507.

² *Hunt v. Gray*, 76 Iowa, 268; 41 N. W. Rep. 14 (1889); *Getting v. Lane*, 17 Neb. 77; *Oglesby v. Hollister*, 76 *Armstrong v. Morrill*, 81 U. S. (14 Wall.) 120.

statute of limitations, evidence that the deed was not founded upon a proper judgment is immaterial. *Lewis v. Barnhardt*, 43 Fed. Rep. 854 (1891).

A tax deed, void on its face, is not sufficient color of title to bring possession thereunder within Mansf. Dig. Ark., § 4475, which provides that no action for the recovery of lands, against persons holding them by virtue of a purchase at a tax sale, shall be maintained, unless plaintiff, or those under whom he claims, has been in possession within two years before. *Redfield v. Parks*, 132 U. S. 239; 10 S. Ct. Rep. 83.

Under Rev. St. Ill., 1889, C. 83, § 6, which makes seven years' payment of taxes under color of title constitute good title, the holder of an invalid tax deed, who has paid taxes on the land described therein for seven successive years, acquires good title thereto as against the former owner, although during part of that time an action of ejectment brought by such former owner has been pending. *Miller v. Pence*, 132 Ill. 149; 23 N. E. Rep. 1030 (1890).

Although the tax deed under which the occupant claimed contained a recital showing that the assessment under which the tax sale was made was invalid, yet since it contained all the other requisites of a good deed, including a sufficient description of the land claimed under it, it was as effective as notice of the extent of defendant's possession and claim as if the objectionable recital had been omitted. *Wilson v. Atkinson*, 77 Cal. 485; 20 Pac. Rep. 66 (1889).

§ 97. A Tax Certificate Not Color of Title.—The term "color of title" means a deed or survey of the land placed upon the record of land titles, whereby notice is given to the true owner and all the world that the occupant claims the title.¹ If the title under which a party relying upon possession, claims, and originally entered, be so defective as to convey no title, yet the adverse possession will not be affected by the defects in such title;² that is, a grantee who occupies real estate as owner, under a deed which fails to convey the title, for such length of time that the bar of the statute is complete, will have a perfect title by adverse possession.³ But the instrument, whatever its name may be, must purport to convey the title. A tax certificate does not purport to convey the title. It is merely evidence of the purchase of the land, and a certain statutory period allowed the land owner to redeem, until the time for redemption has expired; the purchaser has no interest in the land except, perhaps, his lien for the taxes paid. But when the time for redemption has expired he may, upon his compliance with the statutory provisions, have his deed; this deed is

¹ 3 Wash. Real Prop., 154.

(N. Y.) 365; *La Fromboise v. Jack-*

² *Jackson v. Todd*, 2 Caines (N. Y.), son, 8 Cow. (N. Y.) 589.

183; *Jackson v. Sharp*, 9 Johns. (N. Y.) 391; *Snell v. Iowa, etc., Co.*, 59 Iowa, (Y.) 162; *Jackson v. Waters*, 12 Johns. 701; 13 N. W. Rep. 848.

commonly called a tax deed and is sufficient for color of title even if too defective to convey the title.¹

§ 98. **What Has Been Held Not To Be Color of Title.**—A sale of a life estate as against the reversioner does not constitute color of title² and so a record of a survey does not of itself constitute color of title.³ The same is true of an executory contract,⁴ an assignment of homestead,⁵ a tax certificate,⁶ and an invalid tax lease,⁷ a void judgment of a court⁸ and a pre-emption claim, although it may be in the language of the act, providing that "such evidence of right to land recognized by the laws of the government" as would maintain trespass to try title, yet, until it is perfected, it is neither such title nor color of title as can support limitation.⁹ Proceedings in administering and settling the estate of a person represented to be dead but actually still alive, are void for all purposes, and an entry and continuous occupation under such proceedings, exclusive of any other right, will not bar an action to recover the land.¹⁰ A deed which does not contain the description of the land,¹¹ an instrument in which the grantor admits the title in another,¹² and the record of an ejectment suit when a defendant has successfully defended possession, are not color of title to support adverse possession.¹³ A deed to a tenant in possession from one who has no title to the land is void, and insufficient as a basis for adverse possession.¹⁴ Where the father and mother of a woman who died seized of land, executed to a wife and her husband a deed, which mentioned decedent as the "wife of R." and recited that the grantee's wife "was the daughter of" decedent, and that the grantors were decedent's heirs, and conveyed all the lands

¹ *McKeighan v. Hopkins*, 14 Neb. 361; 15 N. W. Rep. 711 (1883).

² *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; *Hall v. Vandergrift*, 3 Binn. (Pa.) 374; *Dewey v. McLain*, 7 Kan. 126; 12 Am. Rep. 418.

³ *Atkinson v. Patterson*, 46 Vt. 750.

⁴ *Rigor v. Frye*, 62 Ill. 507.

⁵ *Keener v. Goodson*, 89 N. C. 275; *Grant v. Edwards*, 86 N. C. 468.

⁶ *McKeighan v. Hopkins*, 14 Neb. 361; *Bride v. Watt*, 23 Ill. 507.

⁷ *Bense v. Gray*, 6 J. & S. (N. Y.) 447.

⁸ *Melia v. Simmons*, 45 Wis. 334; see *Huls v. Buntin*, 47 Ill. 396; *White-side v. Singleton*, Meigs (Tenn.), 207.

⁹ *Buford v. Bostwick*, 58 Tex. 63; *Clark v. Smith*, 59 Tex. 275.

¹⁰ *Melia v. Simmons*, 45 Wis. 334.

¹¹ *Humphreys v. Hoffman*, 33 Ohio, St. 395; *McDonough v. Jefferson Co.* (Tex.), 15 S. W. Rep. 490 (1891).

¹² *Simmons v. Lane*, 25 Ga. 178.

¹³ *Hickman v. Link*, 97 Mo. 482; 1 S. W. Rep. 12; 10 S. W. Rep. 600.

¹⁴ *McRoberts v. Bergman*, 57 Hun, 591; 11 N. Y. Sup. 108 (1890).

which descended to the grantors at decedent's death, and the daughter's husband afterward brought suit against decedent's predecessors in title, in which he alleged that he owned the land under the deed from decedent's father and mother, and that the deeds under which she claimed were lost or destroyed, and had never been recorded, and prayed that defendants or a commissioner make a conveyance which should vest in him the fee, a decree was entered directing the execution of a deed, which should vest in the husband all of defendant's interest, and a commissioner's deed was executed accordingly. It was held that the husband took the deed under the decree, with both actual and constructive notice of his wife's rights in the land, not only as his pretended co-tenant under the deed from decedent's father and mother, but of her rights as owner of the fee by descent, and the deed did not amount to color of title.¹

§ 99. **Extent of the Holding.**—When a party is said to have color of title, the term implies that some act has been done or some event has occurred by which some title, good or bad, has been conveyed to him; and one who enters under such color of title holds according to the boundaries contained in the deed, writing or agreement upon which he holds his claim.²

¹ Orthwein v. Thomas, 127 Ill. 554; 385; Cline v. Catron, 22 Gratt. (Va.) 21 N. E. Rep. 430. 378; Creekmur v. Creekmur, 75 Va.

² Gordon v. Tweedy, 74 Ala. 232; 430; Core v. Faupel, 24 W. Va. 238; Stevens v. Hollister, 18 Vt. 294; 46 Am. Packard v. Moss (Calif.), 8 Pac. Rep. 818; Bernal v. Gleim, 33 Calif. 676; Dec. 154; Hubbard v. Austin, 11 Vt. Ibert v. Reed, 1 N. & McC. (S. C.) 129; Waldron v. Tuttle, 4 N. H. 371; 374; Bank v. Smyers, 2 Strobb. (S. C.) Cheeney v. Ringold, 2 H. & J. (Md.) 24; Golson v. Hook, 4 Strobb. (S. C.) 87; Baker v. Swan, 32 Md. 355; Ege 23; Senior v. South, 10 Ired. (S. C.) v. Medlar, 82 Pa. St. 86; Saxton v. 237; Beverly v. Burke, 9 Ga. 440; 54 Hunt, 20 N. J. L. 487; Monroe v. Am. Dec. 351; Field v. Boynton, 33 Merchant, 28 N. Y. 9; Crary v. Good- Ga. 239; Veal v. Robinson, 70 Ga. 809; /man, 22 N. Y. 170; La From- Coleman v. Billings, 89 Ill. 183; Brooks boise v. Jackson, 8 Cow. (N. Y.) 589; v. Bruyn, 35 Ill. 394; Mylor v. Hughes, 18 Am. Dec. 463; Sparhawk v. Bul- 60 Mo. 105; Ware v. Johnson, 55 Mo. lard, 1 Met. (Mass.) 95; Poignard v. 500; Chapman v. Templeton, 53 Mo. Smith, 8 Pick. (Mass.) 272; Jackson 463; Thompson v. Cragg, 24 Tex. 582; v. Oltz, 8 Wend. (N. Y.) 440; Simp- McEvoy v. Lloyd, 31 Wis. 143; Edger- son v. Downing, 23 Wend. (N. Y.) 473; Bird, 6 Wis. 527; 70 Am. Dec., 316; Jackson v. Vermillyea, 6 Cow. 473; Welborn v. Anderson, 37 Miss. (N. Y.) 677. 155; Childs v. Cowley, 9 Dana (Ky.)

§ 100. **Instruments Not Sufficient as Color of Title Sufficient to Show a Claim of Title and Character of Possession—The Law Stated by Mr. Justice Grier.**—"Statutes of limitation are founded on sound policy; they are statutes of repose and should not be evaded by a forced construction; the possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title or any title but possession. A wrongful possession obtained by a forcible ouster of the lawful owner will amount to a disseizin and the statute will protect the disseizor. One who enters upon a vacant possession claiming for himself, upon any pretense or color of title, is equally protected with the forcible disseizor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title under a void and worthless deed has always been received as evidence that the person in possession claims for himself, and of course adversely to all the world. A person in possession of land, clearing, improving and building on it and receiving the profits to his own use, is not bound to show a forcible ouster of the true owners in order to evade the presumption that his possession is not hostile or adverse to him; color of title is received in evidence for the purpose of showing the possession to be adverse; and it is difficult to apprehend why evidence offered and competent to prove that fact should be repeated, till the fact is otherwise proven."¹ It may be stated as a general rule of law that an instrument which is wholly insufficient to constitute a color of title may still be introduced in evidence for the purpose of showing that the party is claiming title to the lands in controversy, and the character of his possession.²

§ 101. **Good Faith in the Claimant.**—Good faith in the claimant is an indispensable element in the law of adverse possession under color of title.³ But by the term good faith as

¹ *Pillow v. Roberts*, 13 How. (U. S.) 543; *Welborn v. Anderson*, 37 Miss. 472.

161.

² *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 604; *Stevens v. Brooks*, 24 Wis. 330; *Root v. McFerrin*, 37 Miss. 51; *Atkinson v. Patterson*, 46 Vt. 765; see *Wing v. Hall*, 44 Vt. 122; *Foulke v. Bond*, 12 Vroom (N. J.),

³ *Bradley v. West*, 60 Mo. 33; *Wing v. Hall*, 47 Vt. 207; *Brimmer v. Props. of Long Wharf*, 5 Pick. (Mass.) 131; *Smith v. Roberts*, 62 Ala. 86; *Gregg v. Sayre*, 8 Peters (U. S.), 253.

used in this connection, it must not be understood that it involves an inquiry into the party's belief in the character or strength of his title or as to whether in fact he has any title. What is meant by the term is simply good faith in claiming possession and title, or in other words, a real intention to claim the land as his own, distinct and hostile to the title of the true owner.¹ An occupant in good faith, of lands, has been defined to be one who not only honestly supposes himself to be vested with the true title, but is ignorant that the title is contested by any other person claiming a superior right to it.² But the term must receive a practical and common sense construction.³ It does not imply or involve a belief on the part of the occupant in the strength or validity of his title.⁴ And actual or constructive notice to him of irregularities in his title, does not necessarily impute a lack of good faith on his part.⁵

Bona fide purchaser: Where at the time of suing M. for land, it had been in the adverse possession of S. for thirteen years, and afterward, and after a sufficient time had elapsed for the title of S. to mature, he conveyed to M., who conveyed to plaintiff pending the action, and neither S. nor plaintiff was a party to the action, or had notice of it, and continuous possession had been held by S., M., and plaintiff for over thirty years, a judgment rendered against M. twenty-three years after said action was brought could not defeat the rights of plaintiff as a *bona fide* purchaser. *Wallace v. Marquett*, 88 Ky. 130; 10 S. W. Rep. 374; Am. Dig, 1889, 43.

§ 102. **The Existence of Good Faith Presumed.**—Fraud is not to be presumed; its existence must always be proved; good faith in the sense here under consideration must be understood to be the opposite of bad faith, and its non-existence, as in all other cases where fraud or bad faith is imputed, must be established by proof. It is a well settled rule of law that good faith is always presumed until the contrary is shown, and he who alleges bad faith or fraud assumes the burden of proving it.⁶

¹ *Davis v. Hall*, 92 Ill. 85.

⁵ *Davis v. Hall*, 92 Ill. 85. Mere

² *Gordon v. Tweedy*, 74 Ala. 233; *Cole v. Johnson*, 53 Miss. 94; *Green v. Biddle*, 8 Wheat. (U. S.) 1; where the doctrine was defined as applied to an occupant, exempting him from the payment of mesne profits under the civil law.

notice of an outstanding title to land in a third person at the time of purchasing it, is not such fraud as will prevent the purchaser from acquiring a prescriptive title by possession, if he acted in good faith. *Lee v. Ogden*, 83 Ga. 325; 10 S. E. Rep. 349 (1890).

³ *Winters v. Haines*, 84 Ill. 585.

⁴ *Dothard v. Benson*, 72 Ala. 541.

⁶ *Read v. Howe*, 49 Iowa, 65;

§ 103. **Knowledge of Fraud, Imperfect Title, etc., by the Occupant.**—Upon the question as to the effect of knowledge or notice of the imperfections of his title in the occupant of premises, claiming under color of title, the authorities are not uniform. The exemption of an occupant to account for profits under the civil law was strictly confined to the case of a *bona fide* possessor, who not only supposed himself to be the true proprietor of the land but who was ignorant that his title was contested by some other person claiming a better right to it. Mr. Justice Washington of the United States Supreme Court, in commenting upon the rule (not admitting that this doctrine was recognized by the courts of Virginia), said: "Most unquestionably this character (*bona fide* possessor) can not be maintained for a moment after the occupant has notice of an adverse claim, especially if it be followed up by a suit to recover possession. After this he becomes a *mala fide* possessor and holds at his peril, and is liable to restore all the mesne profits together with the land."¹

This definition seems to have been applied to an occupant in good faith under color of title by some courts. In a later case the question arose whether the grantees in a deed of lands had any knowledge of the fraud committed by the grantor or participated in it. This knowledge the court charged the jury was immaterial, as the fraud of the grantor rendered the deeds void, and consequently they could give no color to an adverse possessor. In reviewing the case, Mr. Justice McLean said, in substance, this instruction is clearly erroneous. If the grantor be justly chargeable with fraud, yet, if the grantees did not participate in it, if when they received the deeds they had no knowledge of it, there can be no doubt that the deeds do give color of title under the statute of limitations. Upon their face the deeds purport to convey a title in fee, and having been accepted in good faith they show the nature and extent of the

Brown v. King, 5 Met.* (Mass.) 173; Stubblefield v. Borden, 92 Ill. 279; McMullin v. Erwin, 58 Ga. 427; Smith v. Ferguson, 91 Ill. 304; Russell v. Hannavan, 50 Mo. 536; Newton v. Mayo, 62 Ga. 11; Magee v. Gouverneur, 60 Ill. 140; Brooks v. Magee, 37 Miss. 138; Robertson v. Bruyn, 35 Ill. 394.

Wood, 15 Tex. 1; 65 Am. Dec. 140; ¹ Cooper's Justinian, Lib. 2, Tit. 1, Texas Land Co. v. Williams, 51 Tex. § 85; Green v. Biddle, 8 Wheat. (U. S.) 79.

Walbrun v. Ballen, 68 Mo. 164;

grantees' claim to the premises.¹ The rule upon the subject in New York was stated by Chancellor Jones in 1827, as follows: "It is settled by the decisions of this court (the Court of Errors) that it is enough that the possessor be in under a claim of title to clothe it with the character of an adverse holding, and to give it efficacy as a defense, when of sufficient age to be a bar; and that an invalid or defective title, if believed to be good, will be equally operative with a valid one in giving effect to a possession taken and held under it. * * * If, therefore, the vendee erred in supposing that he had acquired a good title to the land, still the exclusive possession of it, claiming an exclusive right to it under that title, however defective or invalid it may have been, was sufficient after the lapse of twenty years, to bar the entry of the petitioner." It was contended that the purchase and possession were fraudulent. The court remarked, "if that objection to the title were well founded, it might be fatal, for fraud vitiates whatever it touches."²

In 1833 the same court announced the doctrine that a deed fraudulently obtained is not available as the foundation of an adverse possession so as to avoid a subsequent conveyance; nor is a deed available for such purpose executed by a person assuming to act as the attorney of the grantor, but without authority, when such authority is known to the grantee, to constitute a possession adverse, so as to bar a recovery or to avoid a deed subsequently executed by the true owner. The party setting up the possession must, in making his entry upon the land, act in good faith; he must rely on his title; he must believe the land to be his and that he has title thereto, although his title may not be rightful or valid; but if the title be an absolute nullity, as a deed obtained by fraud or forgery, it will not serve as the foundation of an adverse possession.³ Later on the same court held that neither fraud in obtaining nor continuing the possession, or knowledge on the part of the occupant that this claim is unfounded, wrongful and fraudulent, will excuse the negligence of the owner in not bringing his action for the possession of the lands within the described period; nor will his ignorance of the injury, until the statute

¹ Gregg v. Lessee of Sayre et ux., 8 Peters (U. S.), 244.

³ Livingston v. The Peru Iron Co., 9 Wend. (N. Y.) 1.

² Clapp v. Bromagham, 9 Cow. (N. Y.) 557.

According to the greatest authorities a *covinous* conveyance of land is as *no conveyance as against* the interest intended to be defrauded, and ought by the rules of good pleading, so to be treated, where a party is seeking to avail himself of the protection of the statutes of fraudulent conveyances, for the maxim is *pro possessore habetur qui dolo desiit possidere*. Roberts on Fraud, 520, Ch. 5.

Applied in the United States courts to purchasers—Notice: The doctrine upon this subject, as to purchasers, is this: that they are affected with constructive notice of all that is apparent upon the face of the title deeds, under which they claim, and of such other facts as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of other facts, extrinsic of the title, and collateral to it, no constructive notice can be presumed, but it must be proved. Story, J., in *Dexter v. Harris*, 2 Mason (U. S.), 536.

§ 104. **The General Rule.**—The general rule upon this subject, or at least the rule which appears to be reasonable and sustained by the weight of authority, is that found in obtaining or continuing a possession, or knowledge that the party's claim of ownership is unfounded and wrongful, will not deprive him of his title by adverse possession, or relieve the true owner of the consequences of the bar of the statute of limitations if the possession of the intruder has in fact been adverse and has been asserted by such open and notorious acts of ownership as are essential in the acquisition of title by adverse possession.¹

§ 105. **A Qualification of the Rule.**—It is believed the rule states the general doctrine of the law in all cases where the adverse possession commences with an actual ouster or disseizin. But this may be effected by an entry under a deed which is void in the sense that no title is conveyed by it; and where a party claims an ouster or disseizin by virtue of an entry under such an instrument, he is claiming the advantage of color of title. In such a case the rule is not applied in all its strictness. A party can not have the advantage of an entry under color of title unless his deed, which gives the color of title, was obtained in good faith. If obtained by fraud, or with knowledge that the grantor had no title to convey, the deed will avail the grantee nothing. But a grantee will not be deprived of the legal advantages of an entry under color of title, unless it be for actual fraud on his part.²

¹ *Foulke v. Bond*, 12 Vroom (N. J.), 541; *Humbert v. Trinity Church*, J.), 541.
² 24 Wend. (N. Y.) 587.

§ 106. **The Reasons for the Rule—By the Court of Errors of New Jersey.**—"The statute of limitations establishes a peremptory and inflexible rule of law, which terminates the rights of the legal owner, and protects the disseizor in his possession, not out of regard to the merits of the latter's title, but for the reason that the real owner has acquiesced in a possession which was adverse for such a length of time that the statute has deprived him of all remedy for the enforcement of his legal title. Possession clandestinely taken and held for the purpose of fraudulently concealing from the real owner knowledge of the acts of ownership over his property, in virtue of which title is endeavored to be obtained, will defeat the effort to acquire title by such means, not on any general doctrine of fraud, but for the reason that possession under such circumstances would be devoid of that notoriety of the possession and of the adverse claim which is necessary to perfect title by adverse possession."¹

§ 107. **Statutes of Limitation.**—These statutes, so far as they apply to actions of ejectment, are founded upon wise considerations of public policy. They are sometimes called statutes of repose and are intended to promote the peace and good order of society by quieting landed possessions and avoiding litigations.² They protect a person in the possession not on account of the merit of his title, for he may have none, but on account of the demerit of the claimant who may be the true owner, in delaying his suit for possession beyond the period allowed him for that purpose by law.³ These statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world.

§ 108. **Conflicting Claimants Under Color of Title.**—Where different persons are in the occupancy of land, all claiming under color of title, the claimant's possession is held to be in the person having the better title; but when both claim under the same title or derive their color of title from the same source,

¹Foulke v. Bond, 12 Vroom (N. Elder v. Bradley, 2 Sneed (Tenn.), J.), 541. 253; McElnoyle v. Cohen, 13 Pet.

²Humbert v. Trinity Church, 24 (U. S.) 312. Wend. (N. Y.) 614; Bledsoe v. Little, ³Sailor v. Hertzogg, 2 Pa. St. 182. 5 Miss. 24; Angell on Limitation, 6;

the one having the oldest possession must prevail over the other.¹

Where adjoining land owners claim a strip of land lying upon the outer boundary of their respective tracts, the constructive possession of such strip attaches to the one having the elder right. *Wait v. Gover* (Ky.), 12 S. W. Rep. 1068 (1890).

Where plaintiff and defendant claim title under the same grantor, ten years' adverse possession by plaintiff under an unacknowledged deed, prior to the grant to defendant, will establish a superior title by prescription. *McInerny v. Irvin*, 90 Ala. 275; 7 So. Rep. 841 (1890).

Defendants' deed embraced in its calls about half of the lot claimed by plaintiff. Both parties derived title from the same source; but the deed to plaintiff's lot was not in existence, though those through whom she claimed had been in possession for more than forty years, of part of the lot, and of the part in dispute they had during that forty years once had ten years' uninterrupted and adverse possession. Defendants had at no time been in possession of the disputed strip for ten years. *Held*, that plaintiff had a good title by adverse possession, and was entitled to relief. *Echols v. Hubbard*, 90 Ala. 309; 7 So. Rep. 817 (1890).

§ 109. Prior Possession Where Neither Party Has Title.—

Where the plaintiff in ejectment shows an adverse possession for twenty years, so that the entry is barred, he is entitled to recover even against a defendant whose possession, for a less period, is lawful.² Angell lays down the doctrine on this subject in the following words: "Where neither party has title in an action of ejectment, it is clear that the party showing the prior possession is entitled to recover, unless the last possession has been continued adversely for the time which the statute of limitations prescribes. It is also unquestionable, that where land has been held under a claim to the fee, for the time prescribed by the statute, and an entry has been made by a party who has the written title, such party may be dispossessed by an ejectment, brought by him who has so held and claimed."³

§ 110. Possession Under Void Grants, Gifts and Sales.

—A grant, sale or gift of land by parol is void by the statute. But when accompanied by the actual entry and possession, it

¹ *Bellis v. Bellis*, 122 Mass. 414; *Crispin v. Hannavan*, 50 Mo. 536; *Semple v. Cook*, 50 Cal. 26; *Winter v. Stevens*, 9 Allen (Mass.), 526; *Cushman v. Blanchard*, 2 Me. 266; 11 Am. Dec. 76; *Riverside v. Townshend*, 120 Ill. 9; *Jackson v. Dieffendorf*, 3 Johns. 269; *Jackson v. Oltz*, 8 Wend. 440.

² *Riverside Co. v. Townshend*, 120 Ill. 9 (1886); *Jackson v. Dieffendorf*, 3 Johns. 269; *Jackson v. Oltz*, 8 Wend. 440; *Fairman v. Beal*, 14 Ill. 244; *Hinchman v. Whetstone*, 23 Ill. 185; *Paullin v. Hale*, 40 Ill. 274.

³ Angell on Limitations, Sec. 381; *Riverside Co. v. Townshend*, 120 Ill. 9 (1886).

manifests the intent of the donee to enter and take as owner, and not as tenant; and it equally proves an admission on the part of the donor, that the possession is so taken. Such a possession is adverse. It would be the same if the grantee should enter under a deed not executed conformably to the statute, but which the parties, by mistake, believe good. The possession of such a grantee or donee can not, in strictness, be said to be held in subordination to the title of the legal owner; but the possession is taken by the donee, as owner, and because he claims to be owner; and the grantor or donor admits that he is owner, and yields the possession because he is owner. He may reclaim and reassert his title, because he has not conveyed his estate according to law, and thus regain the possession; but until he does this, by entry or action, the possession is adverse. Such adverse possession, continued twenty years, takes away the owner's right of entry.¹

§ 111. **Concluding Remarks.**—The courts appear to have concurred, without an exception, in attaching no peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry has been, whether there was an apparent or colorable title, under which a claim has been made in good faith. The authorities appear to be conclusive that a claim to real property, under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statutes of limitation, the other conditions of those statutes being complied with.²

¹ Shaw, C. J., in *Sumner v. 94*; see *Rannels v. Rannels*, 52 Md. Stevens, 6 Met. (Mass.) 338 (1843); 112.

Barker v. Salmon, 2 Met. (Mass.) 32; ² *Wright v. Mattison*, 18 How. Parker v. Proprietors, etc., 3 Met. (U. S.) 50; *Lea v. Polk County Copper Company*, 21 How. (U. S.) 493; (Mass.) 91; *Brown v. King*, 5 Met. (Mass.) 173; *Clapp v. Bromagham*, 9 Wales v. Smith, 19 Ga. 8; *Dickinson v. Brown*, 30 Ill. 299; *Hanna v. Renney*, 75 Ala. 221; *Bartlett v. Secor*, 32 Miss. 125; *Tyler on Ejectment*, 873. 56 Wis. 520; *Graham v. Craig*, 81 Pa. St. 465; *Clark v. Gilbert*, 39 Conn.

CHAPTER XXIII.

VERDICT IN ACTIONS OF EJECTMENT.

- § 1. Verdicts—The Province of the Jury.
2. The Verdict in Actions of Ejectment.
3. All Issues Must Be Found.
4. The Verdict Must Be in Accordance with the Title Proved.
5. Verdicts Between Tenants in Common and Joint Tenants.
6. Verdict Against Several Defendants.
7. General and Special Verdicts.
8. Statutory Provisions.

§ 1. **Verdicts—Province of the Jury.**—The action for the recovery of the possession of lands and tenements is one essentially abounding in questions of fact for the determination of a jury. In these actions under the modern rules of practice, the verdict of the jury must be limited to the lands and tenements claimed in the complaint, and be limited to the lands to which the plaintiff has established his title.¹ It must be in accord with the pleadings and the proofs.² In practice, the courts usually make up and submit to the determination of the jury, all questions of fact touching the title of land.

§ 2. **The Verdict in Actions of Ejectment.**—The form of the general verdict in ejectment is so frequently prescribed by statutory enactments as to render it very difficult to lay down any uniform rule by which its sufficiency can be tested.

A rule stated by Stearns: "Upon the verdict in real actions few questions arise in our practice. Care should be taken, however, to have it drawn up in such a manner as to conform to the points in issue between the parties. But if the substance of the issue is found for the demandant, he will be entitled to judgment though all the circumstances are not found."³

¹ East St. Louis v. Hackett, 85 Ill. 382.

³ Stearns on Real Actions, 217; Porter v. Rummery, 10 Mass. 64; Coke

² Hughs v. Holliday, 3 G. Greene on Littleton, 281 b, 282 a. (Iowa), 30.

Illustrations.

A plaintiff may recover less than he claims, but it must be of the same nature. If he declares for an undivided part, he may recover for a smaller undivided part; but he can not recover an entirety if he declares for an undivided interest, nor an undivided interest if he declares for an entirety. *Carroll v. Norwood*, 5 Har. & J. (Md.) 155; *Harrison v. Stevens*, 12 Wend. (N. Y.) 170.

Verdicts sufficient: The following verdict: "We, the jury, find the defendant guilty of withholding from the plaintiff the following described premises, to wit: Commencing on Madison street fifty-seven feet from the corner of Hancock and Madison streets as indicated by the present line of improvements, running thence seven feet on the line of Madison street; thence at right angles one hundred and seventy-one feet to the alley; thence at right angles toward Hancock street to the line of lots 7 and 8; thence at right angles along said line one hundred and seventy-one feet to the place of beginning; and we further find that the plaintiff hath an estate therein in fee simple," is sufficient. *Clark v. Day*, 93 Ill. 481 (1879).

A general verdict for the demandant upon a writ of entry which describes the demanded premises as bounded beginning at the intersection of two streets named, thence northerly on one of those streets three hundred and forty feet to the river, thence easterly on the river forty-eight and a half feet to a willow tree, thence southerly on land of the tenants three hundred and sixty-five feet to the first mentioned bound, is sufficiently definite. *Howard v. College of the Holy Cross*, 116 Mass. 117 (1874).

Where the description in the writ was for a certain limestone quarry, containing about three acres, and bounded on two sides by adjoining owners, a verdict for the quarry, describing the two boundaries, is sufficient. *Clement v. Youngman*, 40 Pa. St. 341.

A finding "for the defendant ten acres, forty-eight perches, the meadow on the west side of the creek, and find for the plaintiff the balance," is sufficiently certain. *Tryon v. Carlin*, 5 Watts (Penn.), 371.

In Alabama, a verdict not finding, as required by statute, that "the land belonged to the plaintiff at the commencement of the action," but only that "the land belongs to the plaintiff," is sufficient to support a judgment in favor of plaintiff for damages and costs, and to authorize the court to award a writ *habere facias possessionem*. *Stephens v. Westwood*, 25 Ala. 716.

A verdict finding that "the old hedge row," etc., was the boundary line between the parties, was held sufficient in South Carolina. *Hopkins v. Meyers*, Harp. (S. C.) 37.

And a verdict for "the land in the declaration described," is sufficiently specific, although the declaration does not precisely ascertain the quantity or boundary. *Farrow v. Farrow*, 2 J. J. Marsh. (Ky.) 388.

Verdicts insufficient: In an action of ejectment brought for an entire tract of land, the jury returned a verdict for twenty acres on the lower or south end of the tract. It was held void for uncertainty. *Nolan v. Sweeney*, 80 Pa. St. 77.

A verdict that "the defendant should have the third part of the forty-one acres and thirty-two perches, and if any overplus it goes to the plaintiff," is too uncertain to render judgment upon it. *Smith v. Jenks*, 10 Serg. & R. (Penn.) 153.

A special verdict in ejectment has been held insufficient because it did not find the time of the death of a person, upon which the title of the lessors of the plaintiff depended, which fact, from the circumstances disclosed in the verdict, could have been found by the jury; and for not finding whether the defendant, or those under whom he claimed, had or had not such possession of the land as would be sufficient for his defense in that action whatever might be the state of the title. *Cropper v. Carlton*, 6 Munf. (Va.) 277.

A verdict as follows: "In this case the jury find the issue for the plaintiffs, and therefore find for them to recover of the defendant the seizin and peaceable possession of the premises described in the declaration, and one dollar damages, and that the defendant have until June 1, 1875, to remove the barn"—was held vitiated by the last clause. *Roberti v. Atwater*, 42 Conn. 266.

§ 3. All Issues Must Be Found.—The jury must pass upon all interrogatories or matters submitted to them by the court. They can not find a verdict as to part of the demand and omit to find as to another part of it,¹ and where several issues are joined the jury must pass upon each of them, for the reason that a judgment entered upon a verdict, finding only one issue where several are joined, will be erroneous if the issues not found are material; but if they are immaterial it is otherwise and the verdict will stand.²

§ 4. The Verdict Must Be in Accordance with the Title Proved.—It is a well settled rule of law, based upon the analogies of the common law, and the authorities, both English and American, that the verdict in ejectment must be in accordance with the title proved; and if the plaintiff shows title to part only of the premises claimed in his declaration or complaint, he is entitled to a verdict for that part and no more. But he can in no case recover more land, in quality or quantity, than is claimed in his complaint.³

¹ *Holmes v. Wood*, 6 Mass. 1; *Marsh. (Ky.)* 69; *Van Alstyne v. Brockway v. Kenney*,² *Johns. (N. Y.)* Spraker, 13 Wend. (N. Y.) 578; 210; *Stearns on Real Actions*, 217. *Magruder v. Peters*, 4 Gill & J. (Md.)

² *Van Benthuyssen v. DeWitt*, 4 323. Where the issue is joined on the *Johns. (N. Y.)* 213; *Stearns on Real Actions*, 217, 218. title only, a verdict for a tract of land "according to the survey filed

³ *McArthur v. Porter*, 6 Pet. (U. S.) in the cause," it being described in 205; *Tryon v. Carlin*, 5 Watts (Penn.), the commencement of the declaration 371; *Howard v. Moak*, 2 Har. & J. as a "message with its appurtenances," and in a subsequent clause as (Md.) 249; *Fite v. Doe*, 1 Blackf. "the said tenement with its appurtenances," and in the conclusion as (Ind.) 127; *Bowles v. Sharp*, 4 Bibb (Ky.), 550; *Scott v. Bealle*, 1 A. K.

§ 5. Verdicts Between Tenants in Common and Joint Tenants.—In actions of ejectment between tenants in common and joint tenants, we have seen that the burden is upon the plaintiff to show by competent proof an actual ouster, and where the question as to the existence of the ouster is submitted to the jury for their determination, they must find specially in the affirmative, or the plaintiff will not be entitled to judgment.¹

§ 6. Verdicts Against Several Defendants.—In an action against two or more defendants charged in the plaintiff's declaration with holding possession of the premises in dispute jointly, if it appear on the trial that the defendants each possess a parcel of the land in severalty, and no part jointly, the plaintiffs will be entitled to a verdict for one possession only, at his election, and the defendants disconnected with that possession are entitled to a verdict in their favor; and if it appear on the trial that one or more of the defendants severally possess each a parcel, and the rest of the defendants possess the residue of the premises jointly, the plaintiff will be entitled to a verdict against the defendants who possess the premises jointly, and the other defendants are entitled to a verdict in their favor.² But it will be borne in mind that verdicts in ejectment are usually regulated by statutory enactments which are quite likely to vary these rules.

§ 7. General and Special Verdicts.—A general verdict in favor of the plaintiff for the premises described in his complaint, is sufficient in law for the entry of a judgment. But a special verdict for a part of the premises claimed will be insufficient, unless the part found is described in the verdict with reasonable precision, so that possession may be delivered upon a judgment entered upon it.³

"the said farm with its appurtenances," is sufficient in ejectment although quantities and boundaries are not mentioned. *Paul v. Smiley*, 4 Munf. (Va.) 468.

¹ *Barnitz v. Casey*, 7 Cranch (U. S.), 456; *Carpenter v. Mendenhall*, 28 Calif. 484; *Taylor v. Hill*, 10 Leigh (Va.), 457; *Pierce v. Wanett*, 10 Ired. L. (N. C.) 446.

² *Tyler on Ejectment*, 581; *Jackson v. Hazen*, 2 Johns. (N. Y.) 438; *Rogers v. Arthur*, 21 Wend. (N. Y.) 598; *Bayard v. Colefax*, 4 Wash. (U. S.) 38; *Dear v. Snowhill*, 1 Green (N. J.), 23. But see *Jackson v. Woods*, 5 Johns. (N. Y.) 278; *Jackson v. Andrews*, 7 Wend. (N. Y.) 152.

³ *Clay v. White*, 1 Munf. (Va.) 162.

§ 8. **Verdicts in Ejectment—Statutory Provisions.**—In many of the States the verdicts in actions of ejectment are regulated by statutory provisions; some of the most important are here given :

(1) ALABAMA.

SECTION 2709. *Verdict for plaintiff; what should specify.* If the verdict is for the plaintiff, it must specify whether it is for the whole or a part only of the premises, and if for a part, must describe such part, and judgment must be rendered accordingly. *Stephens v. Westwood*, 25 Ala. 716; *Alexander v. Wheeler*, 69 Ala. 333; Code of Alabama 1886, Ch. 6.

(2) COLORADO.

SECTION 269. *What verdict proper in different cases; when for plaintiff generally; for one or more plaintiffs; against which defendant; for all the premises; for part of the premises; for undivided share; shall specify estate; duration; right; damages.* The verdict may be either for or against either of the plaintiffs or defendants, and shall be rendered as follows :

First. If it be shown on the trial that all of the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally.

Second. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

Third. If the verdict be for any plaintiff, and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto, at the commencement of the action.

Fourth. If the verdict be for all the premises claimed, as specified in the complaint, it shall in that respect be for such premises generally.

Fifth. If the verdict be for part of the premises described in such complaint, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the description of the premises claimed.

Sixth. If the verdict be for an undivided share or interest

in the premises claimed, it shall specify such share or interest, and if for an undivided share in a part of the premises claimed, it shall specify such share, and shall describe such part of the premises as hereinbefore required.

Seventh. The verdict shall specify the estate which shall have been established on the trial by the plaintiff, in whose favor it shall be rendered, whether such estate be in fee, for his own life, or the life of another, stating such lives, or whether it be for a term of years, specifying the duration of such term, or whether the plaintiff hath established only his right to the possession and occupancy of the premises in controversy. The verdict shall also, if for the plaintiff, find the amount of damages he is entitled to for the ouster or detention or both. Civil Code Colo. 1887, 173.

(3) ILLINOIS.

SECTION 30. In the following cases the verdict shall be rendered as follows:

First. If it be shown on the trial that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally.

Second. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

Third. If the verdict be for any plaintiff, and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises or as claimed title thereto at the commencement of the action.

Fourth. If the verdict be for all the premises claimed, as specified in the declaration, it shall, in that respect, be for such premises generally.

Fifth. If the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the description of the premises claimed.

Sixth. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest, and if for an undivided share in a part of the premises

claimed, it shall specify such share, and shall describe such part of the premises as hereinbefore required.

Seventh. The verdict shall also specify the estate which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee or for his own life or for the life of another, stating such lives, or whether it be for a term of years, and specifying the duration of such term. R. S. 1845, p. 207, § 24; Long v. Linn, 71 Ill. 152.

(4) IOWA.

SECTION 3258. *Form of verdict.* The verdict may specify the extent and quantity of the plaintiff's estate, and the premises to which he is entitled, with reasonable certainty, by metes and bounds, and other sufficient description, according to the facts as proved.

Sec. 3259. *General verdict.* A general verdict in favor of the plaintiff, without such specifications, entitles the plaintiff to the quantity of interest or estate in the premises as set forth and described in the petition.

2 McClain's Statutes, Title XX, Ch. 2, p. 857.

(5) MICHIGAN.

SECTION 27. *Verdict upon joint possession, etc.* If the action be brought against several defendants, and a joint possession or claim of title of all be proved, the plaintiff shall be entitled to a verdict against all, whether they shall have pleaded separately or jointly.

Sec. 28. *Verdict upon several and distinct possessions;* Am. 1869, p. 144, Mar. 30, July 5, Act 78. When the action is against several defendants, if it appear on the trial that any of them, at the commencement of the suit, occupied or claimed distinct parcels in severalty, or jointly, and that other defendants possessed or claimed other parcels in severalty or jointly, all of which titles, possessions and claims were derived from the same source, the jury in such case shall state particularly in their verdict the description of the parcel claimed by each of said defendants, when the said verdict shall be for the plaintiff; and in case the said several titles, claims or possessions were derived from a different source, the plaintiff shall elect at the trial, and before the testimony shall

be deemed closed, against which he will proceed, and a verdict shall be rendered for the defendants not proceeded against.

Sec. 29. *Verdict, how rendered in certain cases.* In the following cases the verdict shall be rendered as follows:

1. If it be shown on trial that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally.

2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

3. If the verdict be for any plaintiffs, and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto, at the commencement of the action.

4. If the verdict be for all the premises claimed, as specified in the declaration, it shall in that respect be for such premises generally.

5. If the verdict be for part of the premises described in such declaration, the verdict shall particularly specify such part as the same shall have been proved, with the same certainty hereinbefore required in the declaration, in the description of the premises claimed.

6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest; and if for an undivided share in a part of the premises claimed, it shall specify such share, and shall describe such part of the premises as hereinbefore required.

7. The verdict shall also specify the estate or right which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee, or for his own life or for the life of another, stating such lives, or whether it be a term for years, or otherwise, and specifying the duration of such term.

R. S. Mich. 1882, Ch. 269.

(6) NEW JERSEY.

SECTION 41. *Verdict of jury for part.* If a verdict be found for the plaintiff or plaintiffs, or either of them, for the whole or a part, the jury shall, by the verdict, particularly specify

such part, and judgment shall be entered thereupon that he or they recover possession of the same, either in whole or in part, as the case may be, with costs, upon which a writ of possession may issue.

Sec. 42. *Verdict and judgment in case possession is severed from title.* Provided, that if it shall appear on the trial that the plaintiff is entitled to the possession of the premises or any part thereof, but that the title thereto (other than the mere possessory right) is in some one of the defendants, who, as landlord, remainder-man, reversioner or otherwise, has been made a defendant by the plaintiff, the verdict shall be, that the plaintiff recover possession thereof, and that the title (other than such possessory right) is in the defendants or some one of them, as the same shall be specially found; and judgment shall be entered thereon in pursuance of such verdict, and a writ of possession shall thereupon be issued accordingly.

R. S. N. J. 1877, title Ejectment.

(7) NEW YORK.

SECTION 23. In the following cases the verdict shall be rendered as follows:

1. If it be shown on the trial, that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally.

2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

3. If the verdict be for any plaintiff, and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto, at the commencement of the action.

4. If the verdict be for all the premises claimed, as specified in the declaration, it shall in that respect be for such premises generally.

5. If the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the declaration, in the description of the premises claimed.

6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest; and if for an undivided share in any part of the interest claimed, it shall specify such share, and shall describe such part of the premises as hereinbefore required.

7. The verdict shall also specify the estate which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee, for his own life, or for the life of another, stating such lives, or whether it be a term of years, and specifying the duration of such term.

2 R. S. N. Y. 1849, p. 399.

(8) OREGON.

SECTION 320. *Verdict of jury.* The jury shall by their verdict, find as follows:

1. If the verdict be for the plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be.

2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property or part thereof, or license or right to the possession of either, established on the trial by the defendant, if any, in effect as the same is required to be pleaded.

R. S. Oreg., Ch. 4, Title I.

(9) TENNESSEE.

SECTION 3969. *Verdict.* When there are more defendants than one, the jury may find the defendants jointly and severally guilty of detaining all or any distinct parcels of the premises, and plaintiff may have judgment against any or all defendants, according to the facts of the case.

Sec. 3970. *Same.* The plaintiff may recover any specific part or share of the premises embraced in the declaration, though less than he claims.

Sec. 3971. The verdict may be for plaintiffs, or such of them as appear to have right to the possession of the premises,

or any part thereof, and against such of the defendants as were in possession thereof, or claim title thereto at the commencement of the action.

Sec. 3972. The verdict may specify the extent and quality of the plaintiff's estate, and the premises to which he is entitled, with reasonable certainty, by metes and bounds, or other sufficient description, according to the facts as proved.

Sec. 3973. If the right of the plaintiff expire after the commencement of the suit and before trial, the verdict shall be according to the facts, and judgment shall be entered for damages for the withholding of the premises by the defendant; and as to the premises, the judgment shall be that the defendant go hence without day.

Sec. 3974. A general verdict in favor of the plaintiff without such specifications, entitles the plaintiff to the quantity of interest, or estate, and the premises, as set forth and described in the declaration.

Milliken & Vertree's Code, Title 2, Ch. 1, 762.

(10) WISCONSIN.

SECTION 3084. *How verdict rendered.* In such actions the verdict shall be rendered as follows:

1. If it be shown on the trial that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally.

2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, or any share or interest therein, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

3. If the verdict be for any plaintiff, and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto, at the commencement of the action.

4. If the verdict be for all the premises claimed, as specified in the complaint, it shall in that respect be for such premises generally.

5. If the verdict be for part of the premises described in the complaint, the verdict shall particularly specify such part, with the same certainty, hereinbefore required in the complaint, in the description of the premises claimed.

6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest, and if for an undivided share in part of the premises claimed, it shall specify such share and shall describe such part of the premises as hereinbefore required.

7. The verdict shall specify the estate which shall have been established on the trial by the plaintiff, if rendered in his favor, whether it be in fee, dower, for life, or for a term of years, specifying such life, or lives, or the duration of such term.

R. S. Wis. 1878, Ch. 133.

CHAPTER XXIV.

JUDGMENT AND EXECUTION.

- § 1. The Effect of a Recovery in Ejectment in Lord Mansfield's Time.
- 2. Under the Modern Practice.
- 3. The Judgment Must Follow the Verdict.
- 4. Judgment upon a Disclaimer.
- 5. The Judgment Relates Back to the Commencement of the Action.
- 6. Judgment Against Survivors.
- 7. Execution.
- 8. When the Plaintiff is Subsequently Dispossessed.
- 9. Writs of Possession, When to Issue—Restitution.

§ 1. **The Effect of a Recovery in Ejectment Stated by Lord Mansfield.**—A judgment in ejectment is a recovery of the possession (not of the seizin or freehold) without prejudice to the right, as it may afterward appear, that was between the parties. He who enters under it, in truth and substance, can only be possessed according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession comes according to right. If he has no title, he is in as a trespasser; and without any entry of the true owner, is liable to account for the profits.¹ The rule laid down by Lord Mansfield has, however, ceased to be the law in nearly, if not all, of the American States in proportion as the common law action of ejectment has been superseded by statutory remedies. The present state of the law upon this subject will be found discussed in the chapter on defenses.²

§ 2. **Under the Modern Practice.**—In the absence of harmony in the adjudicated cases and the legislative policy of the

¹ Lord Mansfield in *Ulyss v. Horde*, 1 Burr. 114; Approved by Lockwood, J., in *Colman v. Henderson*, 2 Scam. (Ill.) 251 (1840). ² See Chapter XX.

American States, it is impossible to develop any general doctrine upon the question of the effect of a judgment in ejectment. It is a general rule in personal actions that the judgment of a court of competent jurisdiction upon the question at issue is forever conclusive upon the parties.¹ This doctrine has not been applied to actions for the recovery of the possession of real property to its fullest extent. But in the latter class of actions it seems to be a well established rule, that if the evidence which is sufficient to sustain the second action would have been sufficient to authorize a recovery under the allegations of the complaint in the first action, then the judgment in the first action is a bar to a recovery in the second action.²

§ 3. **The Judgment Must Follow the Verdict.**—The jury are bound to pass upon titles as they are established by the evidence before them. They therefore do no more than their duty when they find a verdict for the plaintiff, according to the extent and limits of his title, as it is proved by the evidence. It is equally their right so to do, since it is comprehended in the issue submitted to their decision. If, therefore, they find by their verdict, according to the truth of the case, that the plaintiff has title to part only of the premises in the declaration, and describe it by metes and bounds, and that so far the defendant is guilty, and as to the residue find the issue for the defendant, such a verdict, in point of law, would seem to be unexceptionable; and if so, the judgment following that verdict ought to conform to it, and if it should be a general judgment for the whole premises demanded in the declaration, it would be erroneous.³

Such, upon principle and the analogies of the common law, would be the just result; and the authorities clearly establish

¹Blair v. Bartlett, 75 N. Y. 150; ²Story, J., in McArthur v. Porter, Stowell v. Chamberlain, 60 N. Y. 272; 6 Pet. (U. S.) 212; see Allie v. Bigelow v. Winsor, 1 Gray (Mass.), Schmitz, 17 Wis. 169; Orton v. Noonan, 18 Wis. 447; Holmes v. Seely, 235; Nelson v. Couch, 15 C. B. 17 Wend. (N. Y.) 75; City of East St. (N. S.) 99; Smith v. Hemstreet, 54 N. Y. 644; Duchess of Kingston's Case, 20 Howell's St. Tr. 538; Masten v. Olcott, 24 Hun (N. Y.), 587.

³Stowell v. Chamberlain, 60 N. Y. 272; Steinbach v. Relief Fire Ins. Co., 77 N. Y. 498.

(Ill.) 240.

the doctrine, and it is confirmed as a matter of practice by the best text writers on the subject.¹

In an early case, where, in an ejectment, the jury found the defendant guilty as to part of the premises in the declaration and not guilty as to the residue, all the judges were of the opinion that the judgment ought to conform to the verdict, for it was consequent upon the verdict; but that an entry of a general or variant judgment was but a misprision of the clerk, and amendable even after error brought.²

In another case the plaintiff sued for a moiety of a certain parcel of land, and had a verdict for one third part of the premises, and the question was whether, in such a case, the plaintiff could recover for a less undivided part than he sued for. The court held that he could, and that he was entitled to a judgment for the one third. Lord Mansfield, on that occasion said: "The rule undoubtedly is that the plaintiff must recover according to his title. Here he demanded half, and he appears entitled to a third, and so much he ought to recover; so if you demand forty acres you may certainly recover twenty acres; every day's experience proves this."³

In Rolle's Abridgment,⁴ there is a case where an ejectment was brought of a messuage, and it appeared in evidence and was so found by the verdict that only a small part of the messuage was built by encroachment on the lessor's land, not the residue, and the plaintiff had judgment for the parcel accordingly. These authorities, as well as American authorities, demonstrate that a plaintiff is entitled to recover only according to his title, and that if he shows title to a part, he is entitled to have a verdict and judgment for that part and no more.⁵

Illustrations.

Where the verdict in the action of ejectment was in favor of the plaintiff for the premises described, in general terms, the entry of the judgment is, that the plaintiff recover his term against the defendant, of and in the premises aforesaid, or that he recover possession of the premises aforesaid.

¹ Adams on Ejectment, 294; Run-
nington on Ejectment, 432; Bacon's
Ab., Ejectment, F. G.; Story, J., in
McArthur v. Porter, 6 Pet. (U. S.)
212 (1832).

² Mason v. Fox, Cro. Jac. 631.

³ Burgess v. Purvis, 1 Burr. 326;
Abbott v. Skinner, 1 Sid. 229.

⁴ 2 Rolle's Ab., tit. Trial, 704.

⁵ Taylor v. Wilbore, Cro. Eliz. 768;
McArthur v. Porter, 6 Pet. (U. S.)
205 (1832).

Doe v. Wilson, 2 Starkie, 477; Simpson's Heirs v. Shannon's Heirs, 5 Litt. (Ky.) 322; Farrow v. Farrow, 2 J. J. Marsh. (Ky.) 388.

When the action was for the possession of one messuage or tenement and four acres of land to the same belonging, the words "to the same belonging" were held to be void; for land can not properly belong to a house, and then it is a declaration of a messuage or tenement and four acres of land, which, though it be void for the tenement, is good for the land; for which the plaintiff, upon releasing the damages, was permitted to take judgment. Wood v. Payne, Cro. Eliz. 186.

The following judgment under the statute of Illinois—"And said suit having been brought for the recovery of fee simple in the following described messuage, to wit, the south half of the east half of the south west quarter of section 8, in township 31 north, range 11 east, third principal meridian, it is therefore ordered and adjudged by the court that the said plaintiff recover of the said defendant the premises as aforesaid described, and that he have a writ of possession therefor,"—was held to be defective in not specifying the estate to which the plaintiff was entitled in the premises. Koon v. Nichols, 63 Ill. 161 (1872).

§ 4. **Judgment upon a Disclaimer—Its Effect as an Estoppel.**—A judgment upon a disclaimer upon a writ of entry does not transfer the title to the premises disclaimed or operate otherwise than by estoppel of the party disclaiming.¹ A disclaimer is a renunciation of the title and right of possession. If not falsified, it defeats the action. But the demandant is thereupon entitled to the possession of the land, and the party pleading the disclaimer is forever estopped by the judgment from denying his right of possession. If, however, the plea is falsified, the tenant is nevertheless bound by his disclaimer, and the demandant may have judgment against him.² The judgment upon a disclaimer, whether for or against the demandant, is conclusive in his favor upon title, as between the parties. It is sometimes said to inure as a conveyance to the demandant of whatever title or right the party disclaiming had in the land.³ But this is probably the case only between the parties and their privies. A judgment for the demandant can hardly operate to establish any issue or proposition inconsistent with the allegations of the declaration, which are that the tenant hath unjustly and without judgment disseized him.

A disclaimer purports only the disavowal of title or right

Currier v. Esty, 116 Mass. 577 R. Co., 104 Mass. 1; Oakham v. Hall, (1875); Oakham v. Hall, 112 Mass. 112 Mass. 535 (1873).

535 (1873); Proprietor, etc., v. Nashua, ³ Oakham v. Hall, 112 Mass. 535 etc., R. R. Co., 104 Mass. 1. (1873); Jackson on Real Actions, 98;

² Proprietors, etc., v. Nashua, etc., R. Prescott v. Hutchinson, 13 Mass. 439.

in the supposed tenant. It is difficult to see how any new title, or source of title, can be derived by a demandant from such pleadings. Under the feudal law, it is true, a disclaimer by a tenant, at the suit of his lord, worked a forfeiture of his estate, which was immediately thereupon revested in the lord.¹ But that result followed necessarily from the renunciation and consequent destruction of the particular estate. So at common law, a disclaimer in a writ of entry operates to extinguish whatever estate, adverse to the demandant, the tenant may have had in fact at the time of pleading the disclaimer.

If that estate was carved out of the freehold or fee claimed by the demandants, the extinguishment of the particular estate would, of course, to that extent, enlarge the estate and title of the demandant. On the other hand, when two persons are joined as tenants in a writ of entry, a disclaimer by one is said to inure "as a release, to pass all his estate to his co-tenants."² The reason doubtless is, that strictly the action will be against two, only on the ground that they are either joint tenants or co-parceners. If they are so in fact, a renunciation of title by one, and its consequent extinguishment, would of itself clothe the other with the whole title, leaving him sole tenant of the whole land so held. If they are joint disseizors, they are joint tenants by disseizin, and the same result would follow a disclaimer by one, so far as their estate by disseizin is concerned. By joining them in the action, the demandant avers them to be joint tenants.³ If either of them has any estate or title, in sole tenancy or several tenancy, by right, the renunciation of such title by disclaimer would simply extinguish it. This view of the nature and operation of a disclaimer will, as we think, afford a solution of the various and apparently inconsistent effects ascribed to it. The demandant, having no title, can acquire none by the disavowal and extinguishment of his title by one of the tenants joined in the writ or action.⁴

§ 5. The Judgment Relates Back to the Commencement of the Action.—A judgment in ejectment rests on the title in

¹ Jackson on Real Actions, 97.

² Jackson on Real Actions, 72;

³ Jackson on Real Actions, 98; Stearns on Real Actions, 204.

Stearns on Real Actions, 222; Prescott v. Hutchinson, 13 Mass. 439; (1873).

Oakham v. Hall, 112 Mass. 535 (1873).

⁴ Oakham v. Hall, 112 Mass. 535

being at the time of the commencement of the action. It can not be made to relate back of that time to some anterior matter to give it a different effect or character. The doctrine of relation has no bearing upon such a case, and it is never invoked to effect results which might become illegitimate and oppressive. It is never recognized except where its employment is called for to protect right.¹

§ 6. **Judgment Against Survivors.**—In case of the death of one of several defendants before the verdict, his death should be suggested on the record, and the case proceeding, if the plaintiff recovers, the judgment will be general as in other cases.²

§ 7. **Execution.**—The execution in actions for the recovery of the possession of lands and tenements is sometimes called the writ of *habere facias possessionem*, and answers to the *habere facias seisinam* in real actions, for, as in the one case, the freehold being recovered, the sheriff is ordered to give the demandant *seizin* of the lands in question, so also, in the other case, the *possession* being recovered, the sheriff is commanded to give execution of the possession. The writ of *habere facias possessionem* issues as a matter of course where a judgment is entered upon the verdict of a jury.³

§ 8. **When the Plaintiff is Subsequently Dispossessed.**—Where a writ of possession has been executed by putting the plaintiff into possession of the premises in question, and he is subsequently dispossessed by a person claiming under the defendant, the question arises whether the plaintiff can have a new writ or whether he is compelled to bring a new action. It is remarkable that so little is to be found on this subject either in our own or the English reports. In New York it has been held that, if a plaintiff is dispossessed by a person claiming under the defendant's title after he has been put into possession under a writ of possession, an *alias* will be awarded provided there is no pretense of a collusion between the plaintiff and

¹Hemingway v. Drew, 47 Mich. Cro. Jac. 356; Lee v. Rowkeley, 1 554; 11 N. W. Rep. 382 (1882); Mich. Rolle, 14; Darius v. Walsh, 7 Serg. C. R. R. Co. v. McNaughton, 45 & R. (Penn.) 203.

Mich. 87; 7 N. W. Rep. 712.

²Doe v. Burnett, 4 Barn. & Cres.

³Far v. Dunn, 1 Burr. 362; Gree v. 897.

Rolle, Ld. Raym. 716; Rigley v. Lee,

defendant as to the judgment, although the return day of the original writ has not arrived.¹

In the old authorities it is laid down, that if the lessor, after having had possession given to him by the sheriff, and before the writ of possession has been returned and filed, be again ousted by the defendant, he shall have a new writ of possession, or an attachment, and that the return of the writ is so much in the power of the plaintiff, that the court will not, at the instance of the defendant, direct it to be returned; for the return is left to the discretion of the plaintiff, that he may do what is most for his own advantage, in order to have the benefit of his judgment; the best way to effect which is, to permit him to renew the execution at his pleasure, until full execution be obtained.² But this doctrine is much limited by later decisions; and the courts declined to grant a second writ of possession after the first had been executed, unless the expulsion took place within a short period after the execution, and was clearly brought home to the original defendants. A second writ was granted where the expulsion was within a few days of the original execution, and was refused where a period of fifteen months had elapsed.³

The writ of possession may be without a return day, so that it may be re-executed if the defendant forcibly re-enter; or, new process may be awarded by the court, if defendant, or one deriving title under him, re-enter. *Jackson v. Hawley*, 11 Wend. (N. Y.) 182; *Doe v. Roe*, 14 Adolph. & E. (N. S.) 806; 82 Eng. C. L. R. 805.

In executing the writ, the plaintiff acts at his peril; and if he takes more land than he has established his right to, the court will interfere and compel him to make restitution. *Jackson v. Rathbone*, 3 Cow. (N. Y.) 291; *Camden v. Haskill*, 3 Rand. (Va.) 465; *Roe v. Dawson*, 3 Wils. 49; *Doe v. Wilson*, 2 Stark. 477.

§ 9. Writ of Possession—When to Issue—Restitution.—Where the common law rule prevails, the issuance of a writ of possession after the lapse of a year and a day will be irregular, except in cases where it had been enjoined, stayed by

¹ *Schuyler v. Yates*, 11 Wend. (N. Y.) 182 (1834); *Adams on Ejectment*, 444. nor, 1 Roll. Rep. 353; *Davies d. Povey v. Doe*, Blk. 392; *Anon.*, 2 Brown, 253; *Kingsdale v. Mann*, 6 Mod. 27.

² *Rex v. Harris*, Ld. Raym. 482; *S. C.*, Salk. 321; *Goodright v. Hart*, *Molineaux v. Fulgam*, Palm. 289; *Stran*. 830.

Ratliffe v. Tate, 1 Keb. 776; *Loveless v. Ratcliff*, 1 Keb. 785; *Devereux v. Underhill*, 2 Keb. 245; *Fortune v. Johnson*, Styl. 318; *Pierson v. Tave-* ³ *Doe v. Roe*, 1 Taunt. 55; *Doe v. Mirehouse*, 2 Dow. (P. C.) 200; *Doe v. Roe*, 2 Dow. (N. S.) 407.

agreement, appeal, or writ of error; but if issued after the expiration of that time it will not be void, but voidable only.¹ Upon proper application before execution, the writ may be quashed for such irregularity. After the writ is executed, its quashal can do no good, unless a writ of restitution can be awarded. It is to be remarked that in an action of ejectment the court that renders the judgment exercises a species of equitable jurisdiction over the writ of possession, recalling it if justice requires, and sometimes, after it has been executed, awarding a writ of restitution.² Where the party under his writ of *habere facias possessionem* had taken more land than was recovered, or disturbed the possession of a person not a party to the suit, the court would, in a summary manner, inquire into the facts, and award a writ of restitution. The current of authority in this country and in England seems to be that the right to award the writ of restitution in cases not falling within any express statute authorizing such writs, arises by equitable construction by the courts, to prevent wrong and injury to a party who has been wrongfully dispossessed of the premises. Upon an application for a writ of restitution, it is not demandable as a matter of right, but as a matter of justice only.³

¹ Bowar v. Chicago, etc. (Ill.), 26 N. E. Rep. 702; Jackson v. Hasbrouck, 5 Johns. (N. Y.) E. Rep. 702; Oakes v. Williams, 107 Ill. 154; Morgan v. Evans, 72 Ill. 586; Hernandez v. Drake, 81 Ill. 84.

² Bowar v. Chicago, etc., 26 N. E. Rep. 702; Watson v. Trustees, 2 Jones (N. C.), 211; Perry v. Tupper, 70 N. C. 538; Doe v. Shail, 13 Law J. parte Reynolds, 1 Caines (N. Y.), 500; Q. B. 321.

³ Ogden v. Ross, 47 Ill. 147; Coleman v. Henderson, 2 Scam. 251; Ex parte Reynolds, 1 Caines (N. Y.), 500; Q. B. 321.

CHAPTER XXV.

NEW TRIALS IN EJECTMENT.

- § 1. New Trial Defined.
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3. Liberality of Courts in Granting New Trials in Actions of Ejectment.

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4. Under the English Law.
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 44. Statutes of States in Federal Courts.
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 46. Statutes of Different States.
 47. Motion to Vacate an Order for a New Trial—Evidence.

§ 1. **New Trial Defined.**—A new trial is a rehearing of the legal rights of the parties upon disputed facts before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial.¹ New trials are always favored by the courts when there is any question as to the correctness of the verdict.²

§ 2. **The Subject Divided.**—In discussing the question as to when new trials will be granted in actions of ejectment, the subject resolves itself into these divisions:

- (1) New trials at common law.
- (2) New trials under special statutes.

§ 3. **Liberality of Courts in Granting New Trials in Actions of Ejectment.**—In American courts, the rules governing applications for new trials in other civil cases, are applied with greater liberality in actions of ejectment, and new trials are frequently ordered for reasons which would ordinarily be considered manifestly insufficient in other civil actions.³

¹ 2 Bouvier's Law Dic., 220; 4 Chit-ty's Practice, 30; 16 Am. & Eng. Ency., 501. ³ Clayton v. Yarrington, 33 Barb. (N. Y.) 144; Jackson v. Dickenson, 15 Johns. (N. Y.) 309; Jackson v. Laird,

² Union Pac. Ry. Co. v. Diehl, 33 Kan. 426; McCreary v. Hart, 39 Kan. 216. ³ 8 Johns. (N. Y.) 489; Newell v. Sanford, 10 Iowa, 396; White v.

I. NEW TRIALS AT COMMON LAW.

§ 4. **Under the Old English Law.**—It was formerly held in England that new trials would not be awarded in actions of ejectment for the reason that the judgment was merely for the possession of the land in controversy and not conclusive as to the title.¹ But in the latter part of the eighteenth century the ruling was changed on the ground that though a second action of ejectment might be instituted, a change of possession would be effected under the first judgment to the injury of the defeated party.² The rule is now, however, well settled, that new trials will be granted in actions of ejectment upon the same grounds and for the same reasons as in other civil suits at common law.³

§ 5. **The General Rule.**—A motion for a new trial is sometimes considered as an appeal to the equitable discretion of the court to prevent palpable and material wrong. It will not be granted, however, if upon the whole hearing of the motion it appears that substantial legal justice has been done.⁴ The motion is addressed to the judicial discretion of the trial court,⁵ and if shown by the record to have been abused the action of the trial court will be reversed on appeal or writ of error.

§ 6. **The Grounds of the Motion for a New Trial at Common Law.**—The grounds upon which a new trial at com-

Poorman, 24 Iowa, 108. But a new trial will not be granted to enable a defeated party to set up an outstanding title with which he has no connection, for such a defense is *stricti juris*, and will not be favored. Peck v. Carmichael, 9 Yerg. (Tenn.) 325. It will be denied if the purpose is to enable the party to introduce cumulative evidence. Laffin v. Herring-ton, 17 Ill. 399.

¹ Fenwick v. Grosvenor, 2 Salk. 650.

² Goodtitle v. Clayton, 4 Burr. 2244 (1768).

³ Taylor v. Sutton, 15 Ga. 103; Emmons v. Bishop, 14 Ill. 152; Clayton v. School, etc., 20 Kan. 256; Baze v. Arper, 6 Minn. 220.

⁴ Union Bk. v. Middlebrook, 33 Conn. 95; Carrington Mills Co. v. Summers, 36 Ga. 615; Fanning v. McCreary, 1 More (Iowa), 398; Goode v. Love, 4 Leigh (Va.), 635; Cartwright v. Carpenter, 7 How. (Miss.) 328; Adams v. Webster, 25 La. Ann. 113; Huston v. Vail, 51 Ind. 299; Hilb v. Peyton, 22 Gratt. (Va.) 550; Kelsey v. Hammer, 18 Conn. 311.

⁵ Omeara v. State, 17 Ohio St. 515; U. S. v. Lewis, 2 N. M. 459; Carpenter v. Coe, 67 Barb. (N. Y.) 411; Haggin v. Christian, 1 A. K. Marsh. (Ky.) 579; Vandenburg v. Campbell, 64 Miss. 89; Teft v. Marsh, 1 W. Va. 38; Howser v. Com., 1 Smith (Pa.), 332.

mon law will be granted are exceedingly numerous, and are as various as the circumstances of the cases in which they arise. It is not the purpose of the author to enter upon any extended discussion of the doctrine of new trials, the scope of this work not permitting more than a cursory view of the subject, as it applies specially to actions of ejectment. For this purpose the causes for which a new trial may be granted will be divided into three classes:

I. Error on the part of the court or jury.

II. Misconduct on the part of any person in any way intrusted with the administration of justice.

III. Other causes.

I. ERROR ON THE PART OF THE COURT OR JURY.

§ 7. **The Subject Continued.**—Among the most common of these grounds are the following:

(1) Error on the part of the court in admitting improper or in refusing to admit proper evidence on the trial of the cause,¹ in its charge or instructions to the jury, or in its refusal to charge as requested by the parties litigant.²

(2) Error on the part of the jury in returning a verdict contrary to the weight of the evidence in the case;³ or in returning

¹ Trigg v. Conway, 1 Hempst. (U. v. Sutton, 2 Bailey (S. C.), 128; Lack-S.) 538; Fitch v. Woodruff, etc., 29 man v. Wood, 25 Calif. 147.
 Conn. 82; Brown v. Cummings, 7 ² Woods v. Wilds, 11 Ark. 754;
 Allen (Mass.), 507; Kirtland v. Carr, Branch v. Doane, 17 Conn. 402;
 35 Miss. 584; Patterson v. Wester- Greenup v. Stocker, 11 Ill. 202; Hef-
 velt, 17 Wend. (N. Y.) 543; Patterson lin v. Bevis, 82 Ind. 388; Nicholas v.
 v. Ramspeck (Ga.), 10 S. E. Rep. 390; Kersher, 20 W. Va. 251; Ray v. Bell,
 Herreshoff v. Tripp, 15 R. I. 92; Tun- 24 Ill. 444; Smith v. Grover, 74 Wis.
 nell v. Larson, 37 Minn. 258; Sher- 171; Thompson v. People, 14 Neb.
 man v. Delaware, etc., R. Co., 106 N. 524; Watts v. Coxen, 52 Ind. 155;
 Y. 542; Harrison v. Baker, 15 Neb. 43; Morgan v. Taylor, 55 Ga. 254; Brown
 Floyd v. Hamilton, 10 Iowa, 552; v. Kentfield, 50 Calif. 159; Charles-
 Owen v. Jones, 14 Ark. 502; Parsons ton v. Bank, etc., 23 S. C. 410;
 v. Dunway, 5 Ill. 194; Daniel v. Nel- De Berry v. Car. Cent. R. Co., 100
 son, 10 B. Mon. (Ky.) 316; Foye v. N. C. 310; Jenkins v. Levis, 23 Kan.
 Layton, 24 N. H. 29; Bridier v. 255; Friedlander v. Pugh, 43 Miss.
 Yulee, 9 Fla. 481; Patton v. Gregory, 111; Ball v. Bradley, 34 Conn. 496.
 21 Tex. 513; State v. Avery, 17 Wis. ³ Green v. Taney, 7 Colo. 278; Gas-
 672; Stanton v. Banister, 2 Vt. 464; ter v. Hodgins, 21 Ark. 468; Gibson
 Tripp v. Carr, 80 Ind. 471; Young v. v. Webster, 44 Ill. 483; Willis v.
 Buckingham, 5 Ohio, 485; McElevee Lewis, 28 Tex. 185; Branch v. Wil-

special findings, so inconsistent with each other or with the general verdict that a judgment can not be entered;¹ or a verdict so uncertain that the real intent can not be determined;² or so defective in form that any correction of it changes its effect;³ or in returning a verdict contrary to the instructions of the court⁴ or contrary to law.⁵

Illustration.

No evidence to support the verdict: Where there is no evidence to support the verdict, a new trial will be granted. So where the plaintiff established by an unbroken line of record evidence from the United States Government down to himself that he is the owner in fee simple of the land in controversy, and the defendants (his daughter and her husband) showed no title and no right to the possession except what they got from an agreement under which the plaintiff, in consideration of his daughter's living with him, was to deed the daughter the land, reserving to himself the control, possession and use, during his life, there is no evidence to support a verdict in favor of the defendants, and a new trial will be granted. *Zenor v. Johnson*, 111 Ind. 42; 11 N. E. Rep. 616.

§ 8. **The Grounds Must be Substantial.**—The motion for a new trial will not be granted, notwithstanding such errors may have occurred, if the court can see that upon the whole case substantial justice has been done.⁶

II. MISCONDUCT ON THE PART OF ANY PERSON INTRUSTED WITH THE ADMINISTRATION OF JUSTICE.

§ 9. **New Trials for Misconduct.**—When it is made apparent that the verdict may have been affected by any unlawful behavior of any person in any way intrusted with the administration of justice.

son, 12 Fla. 543; *Irving v. Cunningham*, 58 Calif. 306; *Corlies v. Little*, 14 N. J. L. 373.

¹ See *verdicts ante*. *Doe v. North-ern*, 1 Wash. (Va.) 282; *Mitchell v. Printup*, 27 Ga. 469; *Carver v. Carver*, 83 Ind. 368; *Ellworth, etc., R. Co. v. Maxwell*, 39 Kan. 651; *Bunnell v. Bunnell*, 93 Ind. 495; *Pint v. Bauer*, 31 Minn. 4; *Mitchell v. Brown*, 88 N. C. 156.

² *Payne v. Elyea*, 50 Ga. 395.

³ *Kenney v. Habich*, 137 Mass. 421; see *Sheeks v. Sheeks*, 98 Ind. 288; *Bedal v. Spurr*, 33 Minn. 207.

⁴ *Sullivan v. Otis*, 39 Iowa, 328; 95.

Haywood v. Ormsbee, 7 Wis. 11; *Dent v. Bryce*, 16 S. C. 14; *Emerson v. Santa Clara Co.*, 40 Calif. 543; *Dillingham v. Snow*, 5 Mass. 547; *Howard Express Co. v. Wile*, 64 Pa. St. 201.

⁵ *Cook v. U. S.*, 1 Greene (Iowa), 56; *Pace v. Mealing*, 21 Ga. 464; *Thomas v. Brown*, 1 McCord (S. C.), 557; *Dillingham v. Snow*, 5 Mass. 547; *Ross v. Eason*, 1 Yeates (Pa.), 14; *Marr v. Johnson*, 9 Yerg. (Tenn.) 1; *Higgins v. Lee*, 16 Ill. 495; *State v. Ross*, 26 N. J. L. 224; *Todd v. Boone*, 8 Mo. 431.

⁶ *Bank v. Middlebrook*, 33 Conn. 95.

(1) *Misconduct of the judge*: Private communications between the judge and the jury.¹

Intoxication of the judge during the progress of a trial;² a display of bias on the trial when it is such as must have obviously prejudiced the jury against a party;³ allowing needless and scandalous attacks upon the character of parties to the suit on trial;⁴ refusing to allow counsel to discuss the evidence before the jury;⁵ complimenting one attorney at the expense of the other, or the use of language tending to bring an attorney in a case into contempt with the jury;⁶ unfavorable opinions toward another of the parties to the suit;⁷ use of language tending to coerce a jury into an agreement;⁸ and all improper remarks by the trial judge in the presence of the jury liable to influence their verdict,⁹ have been held to be such misconduct on the part of the trial judge as to warrant setting aside the verdict and granting a new trial.

(2) *Misconduct of counsel*: Improper remarks in arguing a case before a jury by counsel, prejudicial to a party's interest;¹⁰ improper remarks during a trial in the presence of the jury;¹¹

¹ Sargeant v. Roberts, 1 Pick. (Mass.) 337; Chinn v. Davis, 21 Mo. App. 363; Hoberg v. State, 3 Minn. 262; Henlow v. Leonard, 7 Johns. (N. Y.) 200; State v. Alexander, 66 Mo. 148; Douglass v. McAllister, 3 Cranch (U. S.), 299; Brown v. Campbell, 1 S. & R. (Pa.) 176.

² Redpath v. Walker, 13 Colo. 109.

³ Wheeler v. Wallace, 53 Mich. 355.

⁴ Rickabus v. Gott, 51 Mich. 227.

⁵ Hunt v. State, 49 Ga. 255; Belmore v. Caldwell, 2 Bibb (Ky.), 76; Olds v. Com., 3 A. K. Marsh. (Ky.) 467.

⁶ McDuff v. Detroit Evening Journal Co. (Mich.), 47 N. W. Rep. 671 (1891); Wheeler v. Wallace, 53 Mich. 355.

⁷ Mittell v. Chicago, 9 Ill. App. 534; Cronkhite v. Dickerson, 51 Mich. 177; People v. Hare, 57 Mich. 505.

⁸ Groom v. Telfair, 11 How. Pr. (N. Y.) 260; Phoenix Ins. Co. v. Moog, 81 Ala. 335; Terre Haute, etc., R. Co. v. Jackson, 81 Ind. 19; Obear v. Gray,

68 Ga. 182; People v. Olcott, 2 Johns. Cas. (N. Y.) 301; State v. Green, 7 La. Ann. 518; State v. Bybee, 17 Kan. 463; Sickler v. Town of Laval, 65 Wis. 572.

⁹ Bowman v. State, 19 Neb. 523; Skelly v. Boland, 78 Ill. 438; Wannock v. Mayor, etc., 53 Ga. 163; Hasbrouck v. Milwaukee, 21 Wis. 217; Hair v. Little, 28 Ala. 236; Cronkhite v. Dickerson, 51 Mich. 177; Moncallo v. State, 12 Tex. App. 171.

¹⁰ Huckell v. McCoy, 38 Kan. 53; Bullard v. Baltimore, etc., R. R. Co., 64 N. H. 27; Bremner v. Greenbay, etc., R. R. Co., 61 Wis. 114; Cleveland Paper Co. v. Banks, 15 Neb. 20; Bedford v. Penny, 58 Mich. 424; Henry v. Sioux City, etc., R. R. Co., 70 Iowa, 233; Campbell v. Maher, 105 Ind. 383; State v. Lee, 66 Mo. 165; Cook v. Ritter, 4 E. D. Smith (N. Y.) 253; Union, etc., Ins. Co. v. Cheever, 36 Ohio St. 201.

¹¹ McDuff v. Detroit Evening Journal Co. (Mich.), 47 N. W. Rep. 671

improper communication with the jury during the trial;¹ introducing immaterial evidence for the purpose of assailing the character of the opposite party;² moving a case to trial in violation of a stipulation to give notice;³ intoxication;⁴ have been held sufficiently improper conduct on the part of counsel engaged in the suit to warrant the granting of new trials.

(3) *Misconduct of the jury*: New trials have been granted in cases where the jury arrive at their verdict by some irregular process other than the discharge of their legal functions, as where they cast lots or make use of any gambling process.⁵

Misconduct of jurors: The use of intoxicating liquors to such an extent as to incapacitate the juror for proper deliberation;⁶ sleeping during the trial;⁷ accepting refreshments or other favors at the expense of a successful party to the suit;⁸ communications with third persons prejudicial to the verdict;⁹ reading newspapers containing influential or prejudicial reports or comments on the trial;¹⁰ voluntary separation after the jury

(1891); *Cleveland Paper Co. v. Banks*, 15 Neb. 20; *Reich v. Balch*, 68 Iowa, 526.

¹ *Koester v. Ottumwa*, 34 Iowa, 41; *Oleson v. Meader*, 40 Iowa, 662; *Stafford v. Oskaloosa*, 57 Iowa, 748.

² *Rickabus v. Gott*, 51 Mich. 225.

³ *Preston v. Eureka, etc., Co.*, 54 Calif. 198; *Foote v. Despain*, 87 Ill. 28; *Hankins v. Mutual, etc., Co.*, 4 Ill. App. 130; *Felton v. Moffet* (Neb.), 45 N. W. Rep. 930 (1890).

⁴ *Fitch v. Ellison* (Colo.), 24 Pac. Rep. 872 (1890).

⁵ *East Tenn., etc., R. Co. v. Winters*, 85 Tenn. 240; *Thompson v. Perkins*, 26 Iowa, 486; *Forbes v. Howard*, 4 R. L. 364; *Warner v. Robinson*, 1 Root (Conn.), 194; *Goodman v. Cody*, 1 Wash. Ty. 329; *Mitchell v. Ehle*, 10 Wend. (N. Y.) 595; *Richard v. Booth*, 4 Wis. 67; *Donner v. Palmer*, 23 Calif. 40; *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 241; *McMurdock v. Kimberlin*, 23 Mo. App. 523.

⁶ *State v. Cuccel*, 24 N. J. L. 249; *Wilson v. Abrahams*, 1 Hill (N. Y.) 207; *Carter v. Ford, etc., Co.*, 85 Ind. 180; *Stone v. State*, 4 Humph. (Tenn.) 27; *Nichols v. Nichols*, 136 Mass. 256;

U. S. v. Gilbert, 2 Sumn. (U. S.) 19; *Jones v. The People*, 6 Colo. 452; *Pratt v. State*, 56 Ind. 179; *Russell v. State*, 53 Miss. 368; *O'Neill v. R. R. Co.*, 45 Iowa, 546; *Roman v. State*, 41 Wis. 312; *Wood v. State*, 31 Ark. 341; *State v. Tatlow*, 34 Kan. 80.

⁷ 12 Am. & Eng. Ency., 373; see *State v. Waldeck*, 12 Neb. 5; *McClary v. State*, 75 Ind. 260. If a party fail to complain of the sleeping juror at the time, the effect of such conduct may be waived.

⁸ *Com. v. Robey*, 12 Pick. (Mass.) 496; *People v. Myers*, 70 Calif. 582; *Dowd v. Guthrie*, 13 Ill. App. 653; *Ensign v. Harney*, 15 Neb. 330; but see *Ford v. Holmes*, 61 Ga. 182; *Eaken v. Canal Co.*, 24 N. J. L. 538; *Tripp v. Comms.*, 2 Allen (Mass.), 556.

⁹ *People v. Kelly*, 94 N. Y. 526; *Pettibone v. Phelps*, 13 Conn. 445; *State v. Hascall*, 6 N. H. 352; *Nesmith v. Insurance Co.*, 8 Abb. Pr. (N. Y.) 141; *State v. Fruge*, 28 La. Ann. 675.

¹⁰ *Hunter v. State*, 43 Ga. 484; *People v. McCoy*, 71 Calif. 395; *Walker v. State*, 37 Tex. 366; *Carter v. State*, 9 Lea (Tenn.), 440.

retire to deliberate upon their verdict;¹ receiving material evidence out of court—as for example, visiting the premises in question without permission of the court; communicating with witnesses out of court as to testimony not admissible, or consulting books or papers not in evidence;² and like other acts of misconduct on the part of jurors, have been held sufficient to vitiate the verdict.

(5) *Misconduct of court officials*: Any act amounting to an attempt on the part of the officer to coerce the jury into an agreement upon a verdict;³ leaving a jury alone with other persons;⁴ permitting a bailiff to be in the room with the jury after it has been charged;⁵ and the like, have been held misconduct sufficient to set aside the verdict.

(6) *Misconduct of the parties*: Intermeddling with the jury;⁶ inducing a witness to testify in a particular manner;⁷ hiring a witness to remain away from the trial;⁸ inducing the defendant to stay away by false representations and then taking judgment in his absence;⁹ fraud and collusion between trial magistrate and the successful party;¹⁰ have been held to be such misconduct on the part of the parties litigant as to warrant the court in setting aside the verdict and granting a new trial.

(7) *Misconduct of bystanders*: Demonstrations of applause at the trial, unchecked, when they have influenced the jury in their verdict, may afford sufficient ground for setting it aside.¹¹

§ 10. **When the Grounds are for Misconduct.**—When the ground for a new trial is misconduct of any person charged

¹ State v. Hornsby, 32 La. Ann. 1268; Monon v. Comm'rs, 21 Kan. 474; Heffron v. Gallupe, 55 Me. 563; 484; Silvey v. State, 71 Ga. 553.

² State v. Brown, 64 Mo. 367; Ott Smith v. Millingham, 34 Ga. 200; v. Over, 106 Pa. St. 1, 19; Hale v. Martin v. Morelock, 32 Ill. 485; Hawrich, 48 Vt. 217; Clements v. Spear, 134; Brown v. Pippin, 12 Heisk. 56 Vt. 401; Collier v. State, 20 Ark. 36.

³ Gholston v. Gholston, 31 Calif. 625; (Tenn.) 657; Lyons v. Lawrence, 12 Obear v. Gray, 68 Ga. 182. Ill. App. 531.

⁴ People v. Hughes, 29 Calif. 257; ⁷ Bostick v. State, 10 Tex. App. 705; Caleb v. State, 39 Miss. 721; Wormley Barron v. Jackson, 40 N. H. 365.

⁵ McClary v. State, 75 Ind. 260; 44. ⁸ Crafts v. Union, etc., Co., 36 N. H.

People v. Knapp, 42 Mich. 267; State ⁹ Barclay v. Hanlan, 55 Miss. 606.

Snyder, 20 Kan. 306; see Morning ¹⁰ Lancaster v. Brady, 4 Jones L. Star v. Cunningham, 110 Ind. 328; (N. C.) 79.

State v. Caulfield, 23 La. Ann. 148. ¹¹ Owens v. State, 64 Tex. 500.

with the administration of justice, the court will not be so particular about seeing if substantial justice has been done, but will grant the motion if it can see that the misconduct might have influenced the jury in making up their verdict.¹

III. OTHER GROUNDS.

§ 11. **Newly Discovered Evidence.**—Courts grant new trials in some cases where an unsuccessful party has, since his defeat, discovered new evidence which, had it been introduced on the trial, would, in all probability, have changed the result. Applications for new trials on such grounds are, however, looked upon with suspicion and disfavor,² and are rarely granted unless the showing is unusually strong and satisfactory.³

§ 12. **When a New Trial Will Be Granted for Newly Discovered Evidence.**—The courts will grant a new trial upon the ground of newly discovered evidence only under the following restrictions:

(1) The evidence must have been discovered since the trial sought to be set aside.⁴

(2) Due diligence must have been used to procure it on the former trial.⁵

¹ Johnson v. Root, 2 Cliff. (U. S.) 108, J. L. 177; Hines v. Driver, 100 Ind. 128; see opinion of Shaw, C. J., in 319.
Com. v. Roby, 12 Pick. (Mass.) 500.

² Wynne v. Newman, 75 Va. 817; Hobler v. Cole, 49 Calif. 250; Wallace v. Kumlin, 42 Ga. 462; John v. Anderson, 32 Gratt. (Va.) 143; People v. Sutton, 73 Calif. 243.

³ Miller v. Ross, 43 N. J. L. 552; Hines v. Driver, 100 Ind. 319; People v. Sackett, 14 Mich. 320.

⁴ Parsons v. Platt, 37 Conn. 563; Ham v. Ham, 39 Me. 263; Gardner v. Gardner, 2 Gray (Mass.), 434; Watts v. Johnson, 4 Tex. 11; People v. Mack, 2 Park. Cr. (N. Y.) 673; Holeman v. State, 13 Ark. 105; Wright v. Central R. R. Co., 21 Ga. 335; Wilson v. Plank, 41 Wis. 94; State v. Hanks, 39 La. Ann. 234; Griffin v. Eliot, 60 Tex. 334; Barrow v. State, 80 Ga. 191; Oakley v. Sears, 7 Robt. (N. Y.) 111; Den v. Winternute, 13 N.

⁵ Holeman v. State, 13 Ark. 105; Butler v. Vassault, 40 Calif. 74; Russell v. Dennison, 45 Colo. 337; Parsons v. Platt, 37 Conn. 563; McCombs v. Chandler, 5 Har. (Del.) 423; Arnett v. Paulett, 59 Ga. 856; Dyke v. De Young, 113 Ill. 82; Clark v. Nelson, 40 Iowa, 678; Cook v. Hare, 49 Ind. 268; Schmurr v. Stults, 119 Ind. 429; Olathe v. Horner, 38 Kan. 312; Berger v. Spaulding, 13 La. Ann. 580; Atkinson v. Connor, 56 Me. 546; Gardner v. Gardner, 2 Gray (Mass.), 434; Austin v. Northern Pac. R. Co., 34 Minn. 351; Vanderburg v. Campbell, 64 Miss. 89; Johnson v. Shortridge, 93 Mo. 227; Heady v. Fishburn, 3 Neb. 265; Miller v. Ross, 43 N. J. L. 552; Price v. Price, 33 Hun (N. Y.), 432; McDonald v. Carson, 95 N. C. 377; Aubel v. Ealer, 2

(3) The newly discovered evidence must be material to the question at issue¹ and so conclusive as to raise the presumption that if a new trial is granted it will change the result.²

(4) It must not go merely to the impeachment of a witness, but to the merits of the case.³

(5) It must not be merely cumulative;⁴ that is, additional

Binn. (Pa.) 582; *Durant v. Philpot*, 16 S. C. 116; *Harbour v. Rayburn*, 7 Yerg. (Tenn.) 432; *Cleveland v. Sims*, 69 Tex. 153; *Stearns v. Allen*, 18 Vt. 119; *Arthur v. Chavis*, 6 Rand. (Va.) 142; *Dower v. Church*, 21 W. Va. 23; *Sawyer v. La Flesh*, 65 Wis. 659; *Chandler v. Thompson*, 30 Fed. Rep. 38.

¹ *Wall v. Trainor*, 16 Nev. 131; *Parsons v. Platt*, 37 Conn. 563; *Varde-man v. Byrne*, 7 How. (Miss.) 365; *Robbins v. Fowler*, 2 Ark. 133; *Potts v. State*, 26 Tex. App. 533; *Sharp v. Sayless*, 39 Ga. 678; *Kepner v. Betz*, 51 N. Y. Supr. Ct. 18; *Town of Man-son v. Ware*, 63 Iowa, 346; *Hines v. Driver*, 100 Ind. 315; *Parker v. Bates*, 29 Kan. 597; *Watts v. Howard*, 7 Met. (Mass.) 478; *Grace v. McArthur*, 16 Wis. 641; *Garnett v. Kirkman*, 41 Miss. 94; *Louisville, etc., R. Co. v. Gilbert*, 88 Tenn. 430; *Miller v. Cook*, 104 Ind. 238; *Sharp v. Traver*, 8 Minn. 273.

² *O'Neal v. State*, 47 Ga. 229; *State v. Stain*, 82 Me. 472; *Tull v. Pope*, 69 N. C. 183; *Travelers' Ins. Co. v. Har-vey*, 82 Va. 849; *Fay v. Richards*, 30 Ill. App. 477; *Lavitsky v. Johnson*, 35 Calif. 41; *Windham Co. Bk. v. Kendall*, 7 R. I. 77; *Stewart v. Hamil-ton*, 19 Tex. 96; *Briggs v. Gleason*, 27 Vt. 114; *Petefish v. Watkins*, 124 Ill. 384; *McCormick v. Central R. Co.*, 75 Calif. 506; *Payne v. Weems*, 36 Mo. App. 54; *Grace v. McArthur*, 16 Wis. 641; *Hall v. Lyons*, 29 W. Va. 410; *Har-ris v. Thompson*, 23 Kan. 372; *Allen v. Perry*, 6 Bush (Ky.), 85; *People v. Sackett*, 14 Mich. 320; *Parsons v. Platt*, 37 Conn. 563; *Sexton v. Lamb*, 27 Kan. 432; *Chrystal, etc., Co. v. Mc-*

Auley, 75 Calif. 631; *Culbertson v. Hill*, 87 Mo. 553; *Miller v. Ross*, 43 N. J. L. 552; *McClusky v. Gerhauser*, 2 Nev. 47; *Woolfinger v. Fenton*, 2 Phil. (Pa.) 19; *Merrick v. Britten*, 26 Ark. 496; *Trask v. Unity*, 74 Me. 208.

³ *Holt v. State*, 47 Ark. 196; *People v. McCurdy*, 68 Calif. 576; *Etheridge v. Hobbs*, 77 Ga. 531; *Martin v. Ehrenfels*, 24 Ill. 187; *Penn. Co. v. Nations*, 111 Ind. 203; *Donnelly v. Birkett*, 75 Iowa, 613; *Parker v. Bates*, 29 Kan. 597; *Clark v. Rut-ledge*, 2 A. K. Marsh. (Ky.) 381; *Brad-bury v. Cony*, 62 Me. 223; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Moore v. Chicago, etc., R. Co.*, 59 Miss. 243; *Watson v. St. P. etc., R. Co.*, 42 Minn. 46; *State v. Smith*, 65 Mo. 464; *Powell v. Jones*, 42 Barb. (N. Y.) 24; *State v. Mitchell*, 102 N. C. 347; *Oregon v. Latshaw*, 1 Oreg. 146; *Struthers v. Wagner*, 6 Phil. (Pa.) 262; *Metzger v. Wendler*, 35 Tex. 378; *Dodge v. Kendall*, 4 Vt. 31; *Brown v. Speyers*, 20 Gratt. (Va.) 296; *Gilliam v. Luddington*, 6 W. Va. 128; *Hooker v. Chicago, etc., R. Co.*, 76 Wis. 542; *Carr v. Gale*, 1 Curt. (U. S.) 384.

⁴ *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Aholtz v. Durfee*, 25 Ill. App. 43; *Abrams v. Van Brunt*, 13 N. Y. Civ. Pro. 402; *Wall v. Trainor*, 16 Neb. 131; *Howland v. Reeves*, 25 Mo. App. 458; *Binson v. Faircloth*, 82 Ga. 185; *Krueger v. Merrill*, 66 Wis. 28; *Glidden v. Dunlap*, 28 Me. 379; *Brad-ish v. State*, 35 Vt. 452; *Waller v. Graves*, 20 Conn. 310; *Watson v. Delafield*, 2 Cai. (N. Y.) 224; *Reed v. McGrew*, 5 Ohio, 386; *Guyst v. Butts*, 4 Wend. (N. Y.) 579.

evidence of the same kind or degree as that previously given and upon the same points.¹

An exception to the general rule: In ejectment for military bounty lands, where the principal question in the litigation is the identity of the soldier, new trials have been granted on newly discovered evidence which is merely cumulative, or for the purpose of admitting evidence to impeach a principal witness. Such cases are, however, deemed exceptional and the general rule does not apply. *Jackson v. Hooker*, 5 Cow. (N. Y.) 207; *Jackson v. Crosby*, 12 Johns. (N. Y.) 354; *Jackson v. Kinney*, 14 Johns. (N. Y.) 186.

(6) It must be such as ought to produce on another trial, an opposite result upon the merits of the case.²

§ 13. **Surprise.**—Any unexpected injurious situations in which one of the parties litigant may be placed without any fault of his own. Any unforeseen disappointment in some reasonable expectation, against which ordinary prudence would not have afforded protection.³ But the surprise must have occurred in reference to some matter material to the issue on trial and injury has resulted therefrom,⁴ without any negligence or want of skill in the complaining party.⁵

§ 14. **When a New Trial Will Be Granted for Surprise.**—The granting of a new trial on the ground of surprise rests

¹ *Parshall v. Klinck*, 43 Barb. (N. Y.) 203; *Cole v. Cole*, 50 How. Pr. 59. ³ *Platt v. Monroe*, 34 Barb. (N. Y.) 291; *Dewey v. Frank*, 62 Calif. 343;

² *Jackson v. Kinney*, 14 Johns. (N. Y.) 186; *Moore v. Philadelphia Bk.*, 5 S. & R. (Pa.) 41; *Bond v. Cutler*, 7 Mass. 205; *Evan v. Rogers*, 2 N. & M. (S. C.) 503; *Stone v. Clifford*, 5 La. 11; *Knox v. Work*, 2 Binn. (Pa.) 582; *Schlencker v. Risley*, 3 Scam. (Ill.) 487; *Geneva, etc., R. Co. v. Sage*, 35 Hun (N. Y.), 95; *White v. State*, 17 Ark. 404; *Arnold v. Skaggs*, 35 Calif. 684; *Moore v. Ulm*, 34 Ga. 565; *State v. Clark*, 16 Ind. 97; *Richards v. Nuckalls*, 19 Iowa, 555; *Goff v. Mulholland*, 33 Mo. 209; *Howard v. Winters*, 3 Nev. 539; *Smith v. Matthews*, 6 Mo. 600; *Crozier v. Cooper*, 14 Ill. 139; *Crafts v. Union, etc., Ins. Co.*, 36 N. H. 44; *Winfield v. Rhea*, 77 Ga. 84; *Town of Kirby v. Waterford*, 14 Vt. 414; *Martin v. Garver*, 40 Ind. 381; *Hupp v. McInturf*, 4 Ill. App. 449.

Peers v. Davis, 29 Mo. 184; *Fretwell v. Laffoon*, 77 Mo. 26; *Halfield v. Macey*, 25 How. Pr. (N. Y.) 193; *Oakley v. Sears*, 7 Robt. (N. Y.) 111. ⁴ *Merrick v. Britton*, 26 Ark. 496; *Hober v. Lane*, 45 Miss. 608; *Todd v. State*, 25 Ind. 212; *Holley v. Christopher*, 3 Mon. (Ky.) 14; *Orthing v. Gunderscheimer*, 12 Fla. 640; *Jackson v. Warford*, 7 Wend. (N. Y.) 62; *Holliday v. Holliday*, 72 Tex. 581; *Beadle v. Graham*, 66 Ala. 102; *Brooks v. Douglass*, 32 Cal. 208; *Blake v. How*, 1 Aik. (Vt.) 306; *Chicago, etc., R. Co. v. Vosburg*, 45 Ill. 311.

⁵ *Walker v. Kretsinger*, 48 Ill. 502; *O'Conner v. Duff*, 30 Mo. 595; *Burt v. Palmer*, 32 Vt. 244; *Dodge v. Strong*, 2 Johns. Ch. (N. Y.) 228; *Carrell v. McCullough*, 63 N. H. 95; *Stewart, etc., Co. v. Coulter*, 3 Utah, 174.

in the discretion of the court,¹ and no uniform rule can be stated to show under what circumstances the discretion will be exercised in favor of the complaining party. The irregular calling of the trial docket;² misleading statements of the trial judge;³ inability to reach court occasioned by high water;⁴ sickness of a party or his own family;⁵ an erroneous supposition that the plaintiff's death abated the suit;⁶ and other like matters have been held to furnish sufficient cause for a new trial on the ground of surprise.

§ 15. **When It Will Not Be Granted.**—When the complaining party has been guilty of some negligence or carelessness, as where he relied upon his counsel's telling him that the counsel for the opposing party would take no advantage of his absence;⁷ or where he resided in another county and mistook the time of trial;⁸ or because he relied upon his attorney to be present;⁹ or where he assumed that his cause would not be reached and absented himself;¹⁰ negligence of counsel employed;¹¹ or his inexcusable absence;¹² and in other like cases, the application for a new trial has been denied.

§ 16. **Mistake.**—The result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done.¹³ A failure to make a defense to an action through the mistake of a party, arising from a misleading remark or ruling of the court, will be a sufficient cause for the granting of a new trial.¹⁴ And so also a mistake of counsel in certain cases where the mistake is

¹ Williams v. Montgomery, 60 N. Y. 648; Hill v. Dueslinger, 61 Iowa, 240; Evans v. Rugee, 63 Wis. 31; Coker v. State, 20 Ark. 53; Board etc., v. Linscott, 30 Kan. 240.

² Donnallen v. Lenox, 6 Dana (Ky.), 89.

³ Edsall v. Ayers, 15 Ind. 286; Clark v. Jarett, 58 Tenn. 467.

⁴ Vannerson v. Pendleton, 8 S. & M. (Miss.) 452. In this case the party was his own counsel.

⁵ White v. Martin, 63 Ga. 659; Whitworth v. Murphy, 29 Iowa, 470; Sherard v. Olden, 6 N. J. L. 344.

⁶ Broas v. Mersereau, 18 Wend. (N. Y.) 653.

⁷ White v. Ryan, 31 Ala. 400; Brock v. Southern, etc., R. Co., 65 Ala. 79.

⁸ Mayer v. Duke, 72 Tex. 445.

⁹ Ferrill v. Marks, 76 Ga. 21; Brown v. Warren, 17 Nev. 417; Geiger v. Burke, 3 S. & M. (Miss.) 439; but see Sturgeon v. Hitchens, 22 Ind. 107; Triplet v. Scott, 5 Bush (Ky.), 81.

¹⁰ Gelton v. Hawkins, 2 J. J. Marsh. (Ky.) 1.

¹¹ Yates v. Monroe, 13 Ill. 212.

¹² Blacketer v. House, 67 Ind. 414; Beal v. Coddington, 32 Kan. 107.

¹³ 3 Jeremy's Equitable Jus., 2358.

¹⁴ Parks v. Nichols, 20 Ill. App. 143.

inexcusable,¹ or where a witness makes a mistake in giving material testimony which probably affected the verdict.²

V. THE APPLICATION FOR A NEW TRIAL.

§ 17. **By Motion in Courts of Law.**—As a general rule the application for a new trial is made by a motion in writing, stating the grounds upon which it is based and supporting the same by affidavits or other proofs where the causes relied upon are matters outside of the record. It must in general be made in the court where the trial is had and usually at the term at which the verdict or decision is rendered, though the practice is not uniform in all the States.³

§ 18. **New Trials in Equity.**—It is of the common jurisdiction of courts of equity to relieve against mistakes in matters of fact, and to set aside judgments at law and allow new trials on the ground of newly discovered testimony, surprise or mistake. Story, in his work on Equitable Jurisprudence,⁴ in speaking of mistakes, says: "This is sometimes the result of accident, in its large sense, but, as distinguished from it, it is some unintentional act or omission, error arising from ignorance, surprise, imposition or misplaced confidence." In the note thereto it is remarked: "Mr. Jeremy defines mistake, in the sense of a court of equity, to be 'that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done.'"⁵ And in speaking of the relief granted by courts of equity from the effect of a judgment at law, the author first named says: "So if a party has, *bona fide*, entirely forgotten the facts, he will be entitled to relief, because, under such circumstances, he acts under like mistake of the facts as if he had never known them."⁶ A party sued at law, having a defense of which he does not know, or of which he can not avail himself at law,

¹ Symons v. Bunnell, 80 Calif. 330; Atkinson v. Dunlap, 50 Me. 111; Prince v. McIlvain, 3 Brev. (S. C.) Denise v. Denise, 41 Hun (N. Y.), 9; 419; McCune v. Northern, etc., R. Co., Marion, etc., R. Co. v. Lomax, 7 Ind. 18 Fed. Rep. 875; but see Birdwell, 406; Racer v. Baker, 113 Ind. 177. v. Cox, 18 Tex. 535.

⁴ Story's Equity Jur., § 110; C. & E.

² Hewey v. Nourse, 54 Me. 256; I. R. R. Co. v. Hay, 119 Ill. 493 (1886). Coddington v. Hunt, 6 Hill (N. Y.) ⁵ 3 Jeremy on Equitable Jurisprudence, 2358.

Huson v. Egan, 6 N. Y. Supp. 661.

⁶ Story's Equity Jur., § 140.

³ Davis v. Menasha, 21 Wis. 491;

either for the reason that it is purely equitable in its nature, or because, by the rules of law, he can not avail himself of it, may enjoin the judgment by bill or petition in equity.¹

§ 19. **The Subject Continued.**—Courts of equity are invested with jurisdiction to decree new trials in actions of ejectment, when the judgment has been obtained by accident, mistake or fraud. But it is contrary to all rules of proceeding, where the distinction between equity and law exists, to try an ejectment suit in a court of equity. In all cases in which the title is legal, and not equitable, the remedy is ample and complete at law and no necessity can exist for requiring a court of equity to assume jurisdiction. When the question of accident, mistake or fraud has been found to exist and the new trial granted, the impediment to proceedings at law is removed; the jurisdiction is at an end. But as the parties have no right to receive or retain any benefits of the accident, mistake or fraud producing the judgment, the court may decree the possession of the premises to be restored to abide the event of a trial of the title in the ejectment suit. A party who obtains an unjust advantage has no right to retain it.²

§ 20. **What is Necessary to Maintain the Bill or Petition.**—Before a bill or petition can be maintained to set aside a judgment to which there was a good defense at law, known to the defendant at the time it was rendered, it must clearly appear that the enforcement of the judgment would be unjust and against conscience, and moreover, that the defendant was prevented from making his defense to the action in which the judgment was obtained by fraud, mistake, accident or surprise, without *laches*, negligence, or default on his part or those representing him.³

VI. NEW TRIALS UNDER STATUTES.

§ 21. **Traditions of the Common Law.**—A title to real estate has, under the traditions of the common law, been held, in all the States where that law prevailed, to be too important, we might almost say, too sacred, to be concluded forever by the result of

¹ *Venum v. Davis*, 35 Ill. 568; C. ³ *Mulkey, J., in Clark v. Ewing*, 93 & E. I. R. R. Co. v. *Hay*, 119 Ill. 493 Ill. 574 (1879). (1886).

² *Walker, J., in How v. Mortell*, 28 Ill. 478 (1862).

one action between the contesting parties. Hence those States which, by abolishing the fictions of the action of the common law, and substituting a direct suit between the parties actually claiming under conflicting titles, which according to the nature of this new proceeding would end in a judgment concluding both parties, have found it necessary to provide for new trials to such extent as each State Legislature has thought sound policy to require. These provisions for new trials in actions of ejectment are not the same in all the States, but it is believed that almost all of them which have abolished the common law action have made provisions for one or more new trials as a matter of right.¹

§ 22. **New Trials Under Statutes.**—In many States new trials in ejectment are allowed under statutory provisions. As an illustration we quote the statute of Illinois:

NEW TRIAL.—The court in which such judgment shall be rendered, at any time within one year thereafter, upon the application of the party against whom the same was rendered, his heirs or assigns, and upon the payment of all costs and damages recovered thereby, shall vacate such judgment, and grant a new trial in such cause; and the court upon subsequent application, made within one year after the rendering of the second judgment in said cause, if satisfied that justice will thereby be promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial; but no more than two new trials shall be granted under this section.²

By the former part of this statute, the unsuccessful party if he makes the application and pays the costs and damages within one year after the rendition of the first judgment, is entitled to another trial as a matter of right without showing cause. In the action of ejectment as in other civil cases, the party against whom a verdict is returned is also entitled to a new trial, if sufficient legal excuse exists, such as a misdirection on the part of the court, or a finding of the jury unsupported by the evidence. The decisions of trial courts refusing new trials in such cases, may be reviewed on error or appeal. But the application allowed by the latter part of the statute stands on a different footing. The court is authorized, within one year from the rendition of the second judgment, to vacate such judgment and award a new trial, if satisfied that justice will be promoted, and the rights of the parties more satisfactorily

¹ *Farmers Loan & Trust Co. v. Waterman*, 106 U. S. (16 Otto) 114 (1881). ² R. S. Ill., Gross' Ed., 1868, 247; R. S. 1845, 208, § 30; R. S. Ill., 1889, 599, § 35; Starr & Curtis' Statutes (Ill.) 989.

ascertained and established. This second application is addressed to the sound discretion of the court and its decision thereon can not be assigned for error. It is not demandable as a matter of course on the payment of the costs and damages, as in the case of the application to vacate the first judgment, nor as a matter of strict legal right, as in the case of the ordinary motion for a new trial founded on an erroneous ruling of the court, or an unauthorized finding of the jury.'

§ 23. **A Rule of Interpretation.**—In some jurisdictions these statutes have been declared to be an exception to an almost universal rule founded upon public policy, and are strictly construed.² In others they have received a very liberal construction.³ The doubtful policy of laws providing for the increase of litigation by granting new trials as a matter of right in cases where none of the common law causes exist, would seem to indicate that the rule of interpretation should not be a very liberal one to say the least.

§ 24. **Who is Entitled to a New Trial Under the Statute.**—In general these statutes allow a new trial to the unsuccessful party, though sometimes it is allowed to the defendant only.⁴ It is usually confined to the parties to the suit, but it has been held that a mortgagee is entitled as of right to a new trial in an action of ejectment to which he was not a party and wherein the judgment had been entered by default against a purchaser from the mortgagor.⁵ And under the Indiana statute it has been held that only the party who is concluded by the judgment, or his heirs, assignees or personal representatives, are entitled to a new trial.⁶

§ 25. **What Judgments May Be Vacated for New Trials.**—The general rule is that the judgment must be rendered upon a trial upon the merits of the case. Under the Michigan statute the right does not exist where there has been a judgment of non-suit merely,⁷ and the same rule has been

¹ Treat, J., in *Riggs v. Savage*, 4 Gil. (Ill.) 130 (1847).

² *Meyers v. Phillips*, 68 Ill. 269; *Chamberlain v. McCarty*, 63 Ill. 262;

Jackson v. Coe, 5 Wend. (N. Y.) 101.

³ *Spence v. McGowan*, 53 Tex. 30; see *Magee v. Chadoin*, 44 Tex. 488; *Singer v. Belt*, 8 Ohio St. 291.

⁴ *Hawes v. Gillett*, 10 Minn. 397.

⁵ *Howell v. Leavitt*, 90 N. Y. 238.

⁶ *Forsyth v. Van Winkle*, 9 Fed. Rep. 247.

⁷ *People v. Judge, etc.*, 37 Mich. 131.

applied in Kansas where neither appearance, answer nor demurrer has been filed;¹ where a judgment was entered pursuant to a stipulation that it should be entered absolute against the appellant if the order of the general term granting a new trial should be affirmed, it was held the right to a new trial under the statute did not exist.²

§ 26. **The Effect of a New Trial Under the Statute.**—The award of a new trial under statutory provisions in an ejectment suit wipes out the verdict and no judgment can be rendered upon it. It is not a bar to anything. It might well happen that a plaintiff with a perfect title might fail in his suit by failing to prove possession by the defendant at the time of suit brought and a verdict pass for the defendant. In such cases or in any case, if the verdict be set aside, it could not bar another action. Setting aside the verdict is as if it had never been, and can not be used anywhere for any purpose. Followed up by a voluntary non-suit, the whole action and all its parts are null.³

§ 27. **Status of the Case After the Vacation of the Judgment and the Granting of a New Trial Under the Statute.**—After the motion for a new trial is allowed under the statute, the case stands for trial under the same conditions, if the status of the parties remain the same, as it did previous to the former trial; but where the status of the parties is changed the rule is different. So where a plaintiff was put into possession under his judgment and the defendant, paying the costs, took a new trial, the plaintiff, who was still in possession of the lands in controversy, applied to the court to discontinue his suit. In denying the application, the court held that he could not thus retain the substantial fruits of the action and shift upon the defendant the burden of showing a valid title. The plaintiff was required to pursue the action until a definite and final result was reached, settling positively the rights of possession of the lands in dispute, or so long as the defendant desired to avail himself of further litigation.⁴

¹ Hall v. Sanders, 25 Kan. 538.

⁴ Carleton v. Darcy, 75 N. Y. 375;

² Roberts v. Baumgarten, 10 N. Y. 11 J. & S. (N. Y.) 373, Supp. 519; 11 N. Y. Supp. 699.

³ Breese, J., in Edwards v. Edwards, 22 Ill. 122 (1859).

§ 28. **Effect of a New Trial Under the Statute Upon Purchasers after Judgment.**—The general rule is well settled that the subsequent granting of a new trial, or even the reversal or vacation of a judgment, does not of itself affect the title of a purchaser in good faith at an execution sale. The theory of the law is that a judgment in ordinary cases must be presumed to be correct. The idea of a mistake or error therein is not to be entertained, and the purchaser is therefore justified in buying on the faith of the presumption that the judgment is good and will stand.¹ But under the statutes of most of our States, in actions of ejectment the losing party is allowed time in which to move for a new trial, and which, as a matter of course, is always granted upon his compliance with the provisions of the statute. The purchaser must be presumed to have known the law and therefore can not be presumed to be a purchaser in good faith, nor can the judgment as to him be presumed to be valid and to stand forever. He takes his title with notice that the judgment in ejectment may be vacated as a matter of right, at the option of the defeated party, at any time within the statutory period. He purchases at his peril, taking his chances of a new trial which may operate to entirely defeat his purchase. To hold otherwise would be to defeat the express provision of the statute. The statute in this case controls and overthrows the presumption that the judgment is correct and must forever stand.²

§ 29. **Statutory Regulations as to Innocent Purchasers.**—In some States the rights of purchasers during the period in which statutory new trials may be granted, are regulated by statute. As an illustration we quote the statute of Indiana.

Innocent purchasers: The result of the new trial, if application therefor is made after the close of the term at which the judgment is rendered, shall in no case affect the interest of third persons, acquired in good faith, for a valuable consideration, since the former trial.³

¹ Cook v. Judge, etc., 70 Mich. 94; 37 N. W. Rep. 906 (1888); Irwin v. Jeffers, 3 Ohio St. 389; Gray v. Brignardello, 1 Wall. (U. S.) 627, 634; Fergus v. Woodworth, 44 Ill. 374; Goodwin v. Mix, 38 Ill. 115; 3093; 2 McClain's Statutes of Iowa, Rorer, Jud. Sales (2d Ed.), §§ 132, 1143, 1144; Herman on Executions, 398; Freeman on Executions, 345.

² Cook v. Judge, etc., 70 Mich. 94; 37 N. W. Rep. 906 (1888).
³ Revised Statutes Indiana, 1881, Article 38, Sec. 1066; see also Revised Statutes of Wisconsin, Chap. 133, Sec. 3270. Tit. XX, Chap. 2, page 857, Sec. 3270.

§ 30. Effect of Granting a New Trial Under the Statute upon Pending Appeals or Writs of Error.—The right to a new trial under the statute is purely an independent statutory remedy and not in anywise dependent upon the right to take an appeal or have a writ of error for causes at common law, and therefore the granting of a new trial under the statute to a party who has an appeal or writ of error pending, does not operate as a discontinuance of the same. The Appellate Court proceeds the same as if the new trial under the statute had not been granted.¹

§ 31. Effect of an Appeal or Writ of Error upon the Right to a New Trial.—An appeal from the judgment rendered by the trial court for causes at common law or for reasons other than a refusal to grant a new trial under the statute or the pendency of a writ of error, for like reasons does not affect the right of the court to grant a new trial under the statute. But the conditions imposed upon the party applying, by the statute, must be complied with, or the right is lost as in other cases.²

§ 32. To What Actions These Statutes Apply.—In many States the term ejectment as a name for an action to recover the possession of real property, has fallen into disuse. New terms, as actions to recover lands, trespass to try title, etc., have taken its place. It is therefore sometimes difficult to determine what are actions to recover the possession of lands within the meaning of these statutes, the term having a somewhat uncertain meaning, especially in States where the distinction between law and equity is abolished. Aside from the actions expressly covered by these statutes, the courts have decided that the statute applies to suits to quiet the title to land;³ to statutory proceedings of forcible

¹ *Rees v. Chicago*, 40 Ill. 107; *Gibson v. Manley*, 15 Ill. 140. The proceedings upon a complaint for a new trial, under section 563, Rev. St. Ind. 1881, are a distinct matter from the original action; and an appeal from the judgment in the original action does not present any question as to the rulings upon the complaint for a new trial. *Harvey v. Fink*, 111 Ind. 249; 12 N. E. Rep. 396.

² *Harvey v. Fink*, 111 Ind. 249; 12 N. E. Rep. 396; *Gibson v. Manley*, 15 Ill. 140; see *O'Blinskié v. Judge Kent Co.*, 34 Mich. 62; *Chautauqua Co. Bank v. White*, 23 N. Y. 347; *Martin v. Wayman*, 38 Texas, 649.

³ *Shuman v. Gavin*, 15 Ind. 93; *Galletley v. Williams*, 15 Ind. 468; *Wills v. Dillinger*, 17 Ind. 253; *Shumcraft v. Davidson*, 19 Ind. 98; *Zimmerman v. Marchland*, 23 Ind. 474;

entry and unlawful detainer for the trial of the title to the land in Minnesota;¹ to actions to revest title in one whose lands have been taken from him by fraud and conveyed to a fraudulent grantee;² to suits for partition where the title is put directly in issue.³

In a suit for partition, where plaintiffs assert title to the land, and specify the nature of their title, and the court finds that it is in them, there is an issue as to title, and an adjudication thereon, which entitles defendants to a new trial as of right. *Powers v. Nesbit* (Ind.), 27 N. E. Rep. 501; Am. Dig. 1891, 3349.

A new trial as of right may be demanded under Rev. St. Ind. 1881, § 1064, in an action to quiet title, upon the applicant giving an undertaking to pay "all costs and damages which shall be recovered against him," and the fact that the bond filed and approved by the court in the presence of the successful party, without objection, is defective in not including the words "and damages," will not render the bond invalid, and, of itself, justify the court in vacating the order granting a new trial, and striking the cause from the docket, upon motion made for the first time after the expiration of the year allowed for a new trial as of right. *Stanley v. Dailey*, 112 Ind. 600; 14 N. E. Rep. 375.

When the action is in the form "for the recovery of real property," the court can not look beyond, to discover whether plaintiff had ulterior purposes in bringing it. *Tompkins v. Augusta & K. R. Co.*, 30 S. C. 479; 9 S. E. Rep. 521.

§ 33. **To What Actions They Do Not Apply.**—The substance of these statutes is similar, but in the procedure under them and their application they vary somewhat in the different jurisdictions. The tendency of our courts of late years has been toward a strict construction. It has been held that they do not apply to actions to set aside or cancel deeds for fraud;⁴ actions of forcible entry and detainer to recover possession of lands for the non-payment of rent;⁵ actions to enforce liens;⁶ parti-

Truitt v. Truitt, 37 Ind. 514; but see *Russell v. Nelson*, 32 Iowa, 215; *Blackford v. Loveridge*, 10 Kan. 101.

¹ *Ferguson v. Kumler*, 25 Minn. 183.

² *McKettrich v. Glenn*, 116 Ind. 27; *Warburton v. Cranch*, 108 Ind. 83; *Voss v. Eller*, 109 Ind. 260.

³ *Kreitline v. France*, 106 Ind. 359; *Campbell v. Hunt*, 104 Ind. 210; *Bucher v. Carroll*, 19 Hun (N. Y.), 618; *Cheeseborough v. Parker*, 25 Kan. 566.

⁴ *Somerville v. Donaldson*, 26 Minn. 75; *Warburton v. Cranch*, 108 Ind. 83;

Voss v. Eller, 109 Ind. 260; *Bradford v. School, etc.*, 107 Ind. 280; *Shumway v. Shumway*, 42 N. Y. 143; 1 Lan. (N. Y.) 474.

⁵ *Whitaker v. McClurg*, 14 Minn. 170; but see *Ferguson v. Kumler*, 25 Minn. 183; *Christie v. Bloomington*, 18 How. Pr. (N. Y.) 12; see *Reed v. Loucks*, 61 How. Pr. (N. Y.) 434; New York Code Civ. Pro., § 1528.

⁶ *Williams v. Thames, etc., Co.*, 105 Ind. 420; *Butler University v. Connard*, 94 Ind. 353; *Jenkins v. Corwin*, 55 Ind. 21.

tion suits, when neither title nor right of possession is involved; ¹ actions against a tenant holding over against his landlord or his grantee; ² actions by administrators for the sale of lands to pay debts; ³ actions to foreclose mortgages; ⁴ actions instituted by heirs to test the validity of a devise; ⁵ actions to compel the conveyance of lands charged with a trust; ⁶ actions to redeem and procure the cancellation of mortgages; ⁷ actions for damages for removing buildings from lands; ⁸ suits to enjoin obstruction to a right of way and for damages; ⁹ suits to enjoin railroad companies from appropriating lands for a right of way; ¹⁰ suits brought by judgment creditors to subject lands conveyed by judgment debtor to the lien of the judgment; ¹¹ actions brought by a party in possession to determine conflicting claims to real property; ¹² actions where the issue is one of boundary only, though nominally in form an action to try title; ¹³ actions of trespass *quare clausum fregit*; ¹⁴ actions to compel a specific performance of a contract to convey real estate. ¹⁵

Illustrations.

An action to enjoin a railroad company from appropriating land for its road, and for damages for such appropriation, is not an action "for the recovery of real property, or the recovery of the possession thereof," within the meaning of Code S. C., § 98, subd. 2, limiting the plaintiff in such cases to two actions. *Tompkins v. Augusta & K. R. Co.*, 30 S. C. 479; 9 S. E. Rep. 521.

¹ *Gullett v. Miller*, 106 Ind. 75; ¹¹ *Liggett v. Hinkley*, 120 Ind. 387; *Pipes v. Hobbs*, 83 Ind. 45; *Swartzel v. Rogers*, 3 Kan. 374. 22 N. E. Rep. 256.

² *Over v. Moss*, 41 Ind. 463.

³ *Fralich v. Moore*, 123 Ind. 75.

⁴ *Sterne v. Vert*, 111 Ind. 408; 112 N. E. Rep. 719; *Shular v. Shular*, 56 Ind. 30. ¹² *Northup v. Romary*, 6 Kan. 240; see *Swartzel v. Rogers*, 3 Kan. 374; *Malin v. Rose*, 12 Wend. (N. Y.) 258; New York Code of Civil Procedure, § 1646.

⁵ *Marvin v. Marvin*, No. 2, 11 Abb. Pr. (N. Y.) 102. ¹³ *Bird v. Montgomery*, 34 Texas, 713; see *Spence v. McGowan*, 53 Ib. 30.

⁶ *McConnell v. McCulloch*, 47 Hun (N. Y.), 405.

⁷ *Voss v. Eller*, 109 Ind. 260; 10 N. E. Rep. 74.

⁸ *Jonsson v. Lindstrom*, 114 Ind. 15; 16 N. E. Rep. 400.

⁹ *Hall v. Hedrick*, 125 Ind. 326; 25 N. E. Rep. 350.

¹⁰ *Tompkins v. Augusta, etc., R. Co.*, 30 S. C. 479.

¹⁴ *Shumway v. Shumway*, 42 N. Y. 143; 1 Lan. (N. Y.) 474.

¹⁵ *Blackford v. Loveridge*, 10 Kan. 101; see *Main v. Payne*, 17 Kan. 608; *Benner v. Benner*, 10 Ind. 256; *Allen v. Davison*, 16 Ind. 416; *Walker v. Cox*, 25 Ind. 271; *Truitt v. Truitt*, 37 Ind. 514.

In Indiana, a new trial, as matter of right, can not be had in case of a suit to redeem and procure the cancellation of a mortgage, on the ground that the action involves the title to real estate, although the complaint also prays that the plaintiff's title be quieted. *Voss v. Eller*, 109 Ind. 124; 10 N. E. Rep. 74.

Where judgment is rendered in an action which embraces one cause of action in which a new trial is matter of right, and another in which it is not, a new trial will not be granted as of right. *Wilson v. Brookshire*, 126 Ind. 497; 25 N. E. Rep. 131.

Rev. St. Ind., 1881, § 1064, providing for a new trial as of right in actions to recover possession and to quiet title to real estate, is not applicable to an action in tort for damages for removing and withholding a house from plaintiff's land. *Jonsson v. Lindstrom*, 114 Ind. 15; 16 N. E. Rep. 400.

Where a suit is brought merely for the foreclosure of a mortgage, and the cross-complaint seeks nothing more than the cancellation of such mortgage, and the quieting of title as to the same, the title to real estate is not involved in such a sense that a new trial as of right may be demanded. *Sterne v. Vert*, 111 Ind. 408; 12 N. E. Rep. 719.

An action to enjoin the obstruction and closing up of a right of way claimed by plaintiff over defendant's land, and for damages, is not an action to recover land so as to entitle defendant to a new trial as of right under the Indiana statute. *Hall v. Hedrick*, 125 Ind. 326; 25 N. E. Rep. 350.

Where, pending plaintiff's action to recover real property, and rents and profits, defendant abandons the property, and plaintiff then dismisses that portion relating to the recovery of the real property, and proceeds with his action as one for rents and profits, and obtains a verdict and judgment therefor, defendant is not entitled, under Civil Code Kan., § 599, to another trial merely by demanding the same. *Wafer v. Hamill*, 44 Kan. 447; 24 Pac. Rep. 950 (1891).

Where title to real estate is not put in issue by the pleadings in partition proceedings, a party is not entitled to a new trial as a matter of right. *Hawkins v. Heinzman*, 126 Ind. 55, 600; 25 N. E. Rep. 708; *Id.* 709 (1891).

Rev. St. Ind. 1881, § 5950, provides that when the owner of any land desires to establish "any corner thereof, or in the same section or line thereof," the county surveyor shall proceed to make the required surveys and locations. By section 5955, the survey is *prima facie* evidence of the corner and lines, but an appeal may be taken, and the survey may be reversed. *Held*, that a survey merely establishes the line, and does not determine title, and therefore, on such appeal, a party can not have a new trial as of right, under section 1064, title "Ejectment," providing that the court rendering the judgment shall vacate and grant a new trial on application by the defeated party within one year, etc. *Russell v. Senior*, 118 Ind. 520; 21 N. E. Rep. 292.

The statutory right to a new trial, in actions for the recovery of land, given by Rev. St. Ind., § 1064, does not apply to an action brought by a judgment creditor to have land standing in the name of the third person declared to be the property of his debtor, and subjected to the lien of his judgment. *Liggett v. Hinkley*, 120 Ind. 387; 22 N. E. Rep. 256.

A judgment in ejectment, entered by the Court of Appeals, pursuant to a stipulation by appellant, under Code Civil Proc. N. Y., § 191, subd. 1, that

judgment absolute should be entered against him, if the order of the General Term granting a new trial should be affirmed, is not within section 1525, providing that a new trial may be had in ejectment as a matter of right. Affirming 10 N. Y. S. 519. *Roberts v. Baumgarten*, 11 N. Y. Sup. 699; Am. Dig. 1891, 3350.

Code Civil Proc. N. Y., § 191, provides that a party can not review in the Court of Appeals an order of the General Term granting a new trial, except upon condition that he stipulate for judgment absolute against him in case the order is affirmed. Section 1525, Id., provides that, at any time within three years after a judgment in ejectment is rendered, the defeated party may obtain a new trial on payment of costs and damages. *Held*, that the latter statute did not apply to a judgment in ejectment entered on an order of the Court of Appeals upon stipulation for judgment absolute. Affirming 11 N. Y. Sup. 699. *Roberts v. Baumgarten* (N. Y.), 27 N. E. Rep. 470; Am. Dig. 1891, 3350.

But in order to fully comprehend the extent of these rulings reference must be had to the peculiar statutes of each State.

§ 34. When the Suit Embraces Different Causes of Action.

—When the suit pending embraces different causes of action, in one of which a new trial is demandable as a matter of right, and in another it is not, a new trial can not be demanded as a matter of right.¹ In the same State while acknowledging the correctness of the rule, it has been held, that where two causes of action are properly joined, as for example, a suit to foreclose a mortgage and a proceeding to recover the possession of land, a new trial as a matter of right was demandable.² In Minnesota, what seems to be a more reasonable rule has been laid down in regard to the right to a new trial, where the suit or proceeding embraces more than one cause of action, in one of which the right exists and in the other not. The new trial is granted as to those causes wherein the right exists and denied as to those where it does not.³

§ 35. The Right to a New Trial May Be Waived.—Like all other rights of this nature in law, the right to a new trial under these statutes may be waived by the parties. So, when the defendant, for the purpose of procuring a continuance, stipulated to waive his right to a new trial if the verdict was

¹ *Wilson v. Brookshire* (Ind.), 25 N. E. Rep. 131; *Bradford v. School*, etc., 107 Ind. 280; *Butler v. University v. Connard*, 24 Ind. 353. This was an action for a divorce in which were issues involving the title and the right to the possession of land; as to these issues a second trial

² *Hamman v. Mink*, 99 Ind. 279; *Miller v. Evansville Bk.*, 99 Ind. 272. was allowed as a matter of right, under the statute.

³ *Schmitt v. Schmitt*, 32 Minn. 130.

against him, being defeated, he applied for a new trial under the statute. He contended that the stipulation was without force because it was entered into before the trial, and before it was known whether he would have occasion to make the application. The court, however, denied the application, holding that the effect should be given to the stipulation according to the intention of the parties. The right of a party to waive a statutory remedy as a future contingent right was recognized.¹

§ 36. Conditions Precedent to the Granting of the Order.—The terms imposed upon the party applying for a new trial as conditions precedent to the granting of the order vary in different States; the payment of the costs is always required, and sometimes the damages awarded on the former trial.² But it may be stated as a general rule that the court has no authority to impose any conditions not contained in the statute. It can not even exercise a discretion. Where the statutory conditions are complied with the new trial follows as a matter of right.³

Where the defeated party in ejectment pays a sum for costs which does not include witness fees taxed, and the attorney for the adverse party gives a certificate of payment in full, but states that he knows nothing of the witness fees, and is not shown to have had authority to give the certificate, and the clerk enters satisfaction, and gives a certificate thereof, and the defeated party makes no further effort to ascertain the witness fees, though he has the files in his possession, the court has no jurisdiction to grant him a new trial under Rev. St. Ill., c. 45, § 35, giving him the right to a new trial on payment of all costs. *Cook County v. Calumet, etc., Canal & Dock Co.*, 131 Ill. 505; 19 N. E. Rep. 46.

§ 37. When the Statute Begins to Run.—The statutes of many States provide for new trials in actions of ejectment upon

¹ *Ladd v. Hildebrandt*, 27 Wis. 135. Under the New York statute where a judgment was entered pursuant to a stipulation that judgment absolute should be entered against the applicant, if the order of the court granting a new trial should be affirmed, it was held that right to a new trial was lost. *Roberts v. Baumgarten*, 10 N. Y. Supp. 519; 11 N. Y. Supp. 699; affirmed 27 N. E. Rep. 470.

² *Golden v. Snellen*, 54 Ind. 282. In Illinois it has been held that the right to a new trial was not lost by

an omission to pay damages of one cent assessed on the former trial, as it was too small an amount for the court to concern itself about. *Meyers v. Phillips*, 68 Ill. 269.

³ *Marrietta v. Emerson*, 5 Ohio St. 288; *Rogers v. Wing*, 5 How. Pr. (N. Y.) 50; *Hazeltine v. Simpson*, 61 Wis. 427; *McManamy v. Ewing*, *McCahon* (Kan.), 171; *Bellinger v. Martindale*, 8 How. Pr. (N. Y.) 113; *Schrodt v. Bradley*, 29 Ind. 352; *Cook Co. v. Calumet, etc.*, 131 Ill. 305.

the compliance by the applicant with certain conditions, generally the payment of costs, and sometimes upon the execution of an undertaking to pay such costs, to accrue in the future, as may be awarded.

As an illustration we cite the statute of Wisconsin:

"The court in which such judgment (in ejectment) shall have been rendered otherwise than upon failure to answer, shall upon application of the parties against whom the same was rendered, his heirs, etc., within one year from the rendition thereof, vacate the judgment and grant a new trial upon condition that all costs recovered thereby or awarded on affirmance of such judgment, on appeal or writ of error, be paid, and that the applicant execute and file an undertaking with sufficient sureties, in such sum as the court shall direct, to the effect that he will pay all costs and damages which may be finally awarded the other party."¹

Under this statute the Supreme Court of Wisconsin hold that the costs are a part of the judgment and that the judgment is not rendered within the meaning of the act until the costs are taxed and inserted therein.² In Michigan, under a similar statute it was held, when the case was tried by the court with a jury, and written findings demanded, that until such findings there was nothing upon which to found the judgment,³ and that where a finding had been made and a judgment rendered thereon, and additional and further findings were made at the request of the defendant, long after the first, it was held that the statute began to run from such last findings.⁴

Under How. St. Mich., § 7832, providing that the court in which judgment in an action of ejectment is rendered shall, "at any time within three years thereafter," upon application of the person against whom the judgment is rendered, etc., grant a new trial, the three years begin to run, when an appeal is taken from the time the judgment is affirmed. *Boyce v. Osceola Circuit Judge*, 79 Mich. 154; 44 N. W. Rep. 343 (1890).

Rev. St. Ind., 1881, § 1064, providing that "the court rendering the judgment, on application made within one year thereafter by the party against whom judgment is rendered, his heirs, assigns, or representatives, and on the applicant giving an undertaking, with surety, to be approved by the court or clerk, that he will pay all costs and damages which shall be recovered against him on the action, shall vacate the judgment and grant a new trial," requires only that the application and bond shall be filed within one year, and not that the court shall take final action within that time. *Rodman v. Reynolds*, 114 Ind. 148; 16 N. E. Rep. 516.

¹ R. S. Wis., Sec. 3092; *Hazeltine v. Simpson*, 61 Wis. 427; 21 N. W. Rep. 299 (1884).

² *Hazeltine v. Simpson*, 61 Wis. 427; 21 N. W. Rep. 299 (1884).

³ *Stansell v. Corning*, 21 Mich. 242.

⁴ *O'Blinskie v. Judge, etc.*, 34 Mich. 62.

In Illinois, the year in which the party must make the application, commences to run from the day upon which the judgment is rendered and not from the last day of the term. *Emmons v. Bishop*, 14 Ill. 152; *Gibson v. Manley*, 15 Ill. 140.

But if the party pays the costs within the year and makes his application for a new trial under the statute, he is entitled to it as a matter of right, and although the court entered no formal order at the time, it will be done as soon as the attention of the court is called to it, though the year has already expired. *Stolz v. Dewey*, 74 Ill. 107.

§ 38. Conditions Precedent, Within What Time to be Performed.—Experience has demonstrated the fact that under these statutes unscrupulous and irresponsible persons frequently avail themselves of possessory rights in defiance of the rights of the lawful owner of the premises, and for these reasons courts seem to have applied a reasonably strict construction to these statutes and require of applicants for new trials a reasonably strict compliance with the conditions of the law.¹

A demand for a second trial in an action for the recovery of real property, under Gen. St. Minn., C. 75, § 11, may be made by the party himself, and a notice embodying such demand, made in his name by an agent authorized by him to make such demand, if seasonably served, is sufficient. *West v. St. Paul & N. P. Ry. Co.*, 40 Minn. 189; 41 N. W. Rep. 1031.

Where plaintiff, after having failed in one action of ejectment, institutes a second action without paying the costs adjudged against him in the first, the second action may be stayed until such costs are paid, notwithstanding plaintiff's poverty, without a violation of Const. Ala., Art. 1, § 14, which provides that every person, for an injury done him in his lands, "shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay." *Shear v. Box* (Ala.), 8 So. Rep. 792; Am. Dig. 1891, 3349.

§ 39. In What Court the New Trial Must Be Had.—The application for a new trial under the statute must, as a matter of course, be made in the court where the judgment is rendered, and when the judgment is vacated the new trial must also be had in the same court. The party having the bar to another trial removed, must be presumed to have done so under an obligation to pursue his remedy under the statute in the same court, and is not at liberty to resort to another tribunal. Such a course would be a fraud upon the law,² though it seems he may, after the entry of the order allowing a new trial, sub-

¹ *West v. St. Paul & N. P. Ry. Co.*, 11; *Cunningham v. Milwaukee*, 13 40 Minn. 189; 41 N. W. Rep. 1031. Wis. 120.

² *Fraser v. Weller*, 6 McL. (U. S.)

mit to a voluntary non-suit, in which case he would, of course, be at liberty to seek his remedy in another tribunal.¹

§ 40. **Practice—Application for a New Trial—Notice to the Opposite Party.**—The fact that a new trial under the statute is demandable as a matter of right, does not dispense with the necessity of making an application for it.² It is not necessary that the opposite party should have notice of the application, and when the application is made and the order for a new trial entered at the same term of court at which the judgment is rendered, the opposite party is charged by law with notice of the proceeding; but if the new trial is obtained at a subsequent term of the court, then the opposite party must have notice that the judgment has been vacated and a new trial ordered, and this notice must be given at least ten days before the first day of the term at which the cause stands for trial, or it can not be moved at that term.³

Failure to give notice during the term, as required by Rev. St. Ind. 1881, § 1065, providing that "the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term next succeeding the granting of the application," does not authorize the court to set aside the previous order granting a new trial; that provision being intended only to prevent the bringing of the case on for trial at the same term at which the new trial is granted. *Stanley v. Holliday*, 113 Ind. 525; 16 N. E. Rep. 513.

A new trial as of right, provided for by Rev. St. Ind., 1881, § 1064, may be granted in the absence and without the knowledge or consent of the opposite party. *Id.*

§ 41. **Evidence on the Application.**—The better practice is to make the application in writing, stating that the conditions precedent have been complied with. Some evidence must, as a matter of course, be produced to the court, showing that the applicant has complied with the requirements of the statute; as the payment of costs, or the damages assessed in the former trial, or the execution of an undertaking to pay future

¹ *Edwards v. Edwards*, 22 Ill. 122 281; *Stanley v. Holliday*, 113 Ind. (1859). 525; *Whitlock v. Van Cleve*, 39 Ind.

² *West v. Cameron*, 39 Kan. 136; 511; *Doster v. Sterling*, 33 Kan. 381. *Anderson v. Kent*, 14 Kan. 207; *Riggs v. Savage*, 2 Gil. (Ill.) 400. Where applications for new trial as of right, after the close of the term at which neither party in ejectment asks for a judgment is rendered, under Rev. St. second trial under Civil Code Kan., Ind., 1881, § 1065, do not require any § 599, the court does not err in failing prior notice to the adverse party. Following *Stanley v. Holliday*, 113 Ind. Kan. 736; 18 Pac. Rep. 894. 525; 16 N. E. Rep. 513. *Brown v.*

³ *People v. Genessee, etc.*, 37 Mich. Cody (Ind.), 18 N. E. Rep. 9.

costs, as required in some jurisdictions, are, in general, matters of record in the court where the application is made; the record is sufficient and no other evidence is required.¹

§ 42. **A Second New Trial in the Discretion of the Court.**—Under the statute of Illinois, the trial court may, in its discretion, within one year after the rendition of the judgment on the first new trial under the statute, grant a second new trial upon being satisfied that justice will be promoted by so doing. The application is, however, addressed to the discretion of the court. A refusal to grant it can not be assigned for error.²

§ 43. **Proceedings on a New Trial.**—It seems an almost universal rule that the proceedings upon the new trial are entirely *de novo* and without reference to any previous action of the parties.³ Unless something has occurred to change the status of the parties since the rendering of the judgment set aside⁴ the plaintiff may submit to a voluntary non-suit⁵ or, if defeated, he may, after having the judgment vacated, purchase a new and distinct title and acquire the right to assert it on the second trial without prejudice,⁶ and the defendant may, on the second trial, repudiate the defense interposed by him on the first trial and defeat, if he can, the plaintiff's recovering on other grounds.⁷

In Texas, where the judgment rendered on the first trial was reversed on appeal, and a new trial ordered, it was held error to permit the defendant to amend his pleading so as to set up a new and different title from that of the former trial. Were such a rule to prevail it was urged there would be no end to litigation; as often as the judgment was reversed the parties could go on acquiring new titles and presenting new issues of law and fact, effectually abrogating the rule giving but two actions of trespass to try title, to the same party, and for the same subject-matter. *Menifee v. Hamilton*, 32 Tex. 495.

And where the plaintiff was defeated in his first action of trespass to try title and afterward brought another action, having previously acquired a new title, the defendant objected to the introduction of evidence tending to establish the new title, upon the ground that the second action was a continuation of the first, and consequently a recovery could not be had upon a

¹Setzke v. Setzke, 131 Ill. 30; 11 N. E. Rep. 915.

⁵Edwards v. Edwards, 22 Ill. 122 (1859).

²Riggs v. Savage, 4 Gil. (Ill.) 129 (1847).

⁶Barrows v. Kindred, 4 Wall. (U. S.) 399; Connolly v. Hammond, 51 Tex. 635.

³Edwards v. Edwards, 22 Ill. 122 (1859).

⁷Rice v. Bixler, 1 W. & S. (Penn.)

⁴Carlton v. Darcy, 75 N. Y. 375; 445. 11 J. & S. (N. Y.) 373.

title acquired after the institution of the action. The court, however, held otherwise and sustained the plaintiff in his action. *Connolly v. Hammond*, 51 Texas, 635.

§ 44. **Statutes of the States in the Federal Courts.**—The statutes of the different States defining the effect of judgments in ejectment upon the title of lands in controversy, and permitting new trials as a matter of right, are held by the Federal Courts to be laws respecting the titles to land, and constituting rules of property. They are binding rules of decision conclusive alike in State and Federal Courts.¹

§ 45. **An Evasion of the Statute.**—It is not an uncommon occurrence in actions of ejectment for a party litigant after a long and vexatious litigation to find the fruits of his contest swept away by the granting of a new trial under these statutes. It is not strange that ingenious litigants should devise some way of evading it. In New York, according to Judge Foster, of the Court of Appeals, it is not very uncommon for a party claiming the title to land and the right of possession, and who desires to avoid the delays consequent upon the statutory right to new trials in actions of ejectment, to bring his action in trespass, and so establish his right upon a single trial, and recover his damages for trespass, and when judgment is perfected, if the defendant does not yield the possession, to bring his action of ejectment, on the trial of which the record of judgment in the action of trespass is conclusive evidence of his right, and render hopeless any attempt to obtain a new trial.² But such evasions have not been sustained in other States.

§ 46. **Statutes of Different States.**—Under the early common law practice judgments in ejectment were not conclusive and new suits could be brought at the pleasure of the parties,

¹ *Jackson v. Chew*, 12 Wheat. 4 Wall. (U. S.) 174; *Barrows v. (U. S.)* 153; *Shelby v. Guy*, 11 Wheat. Kindred, 4 Wall. (U. S.) 399; *Miles (U. S.)* 361; *Polk v. Wendall*, 9 v. Caldwell, 2 Wall. (U. S.) 35; *Cranch (U. S.)*, 87; *Shipp v. Miller*, 2 Hiller v. Shattuck, 5 Chicago Legal Wheat. (U. S.) 316; *Gardner v. Collins*, 2 Pet. (U. S.) 58; *Green v. v. Phenix Fire Ins. Co.*, 18 Int. Rev. Neal, 6 Pet. (U. S.) 291; *Butler v. Rec.* 30; *Forsyth v. Van Winkle*, 9 Young, 5 Chicago Legal News, 146; *Fed. Rep.* 247. *Republic Ins. Co. v. Williams*, Ib. ² 42 N. Y. 143; see *Masten v. Olcott*, 97; *Blanchard v. Brown*, 3 Wall. 24 Hun (N. Y.), 587. (U. S.) 245; *Sturdy v. Jackaway*,

until restrained by an injunction. The enactment of laws making such judgments conclusive was once regarded as an important legal reform, but recent experience would seem to doubt the propriety of them. In some States they have been abolished, and actions for the recovery of real property have been allowed to rest upon the same basis as other cases. The statutes of the different States still retaining them are here given.

(1) COLORADO.

New trial—Rents and profits—Mines—Improvements. Whenever judgment shall be rendered for either party, under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case, but neither party shall have but one new trial in any case, as of right, without showing cause. And after such judgment is vacated, the cause shall stand for trial, the same as though it had never been tried.¹

(2) INDIANA.

New trial of right—Bond. The court rendering the judgment, on application made within one year thereafter, by the party against whom the judgment is rendered, his heirs, assigns, or representatives, and on the applicant giving an undertaking, with surety to be approved by the court or clerk, that he will pay all costs and damages which shall be recovered against him in the action, shall vacate the judgment and grant a new trial. The court shall grant but one new trial under the provisions of this section.²

New trial after term. If the application for a new trial is made after the close of the term at which the judgment is rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term next succeeding the granting of the application.³

¹ Civil Code Colorado (Laws 1887) page 173, Sec. 272. ³Ibid., Sec. 1065.

² Revised Statutes Indiana 1881, Article 38, Sec. 1064.

Where a new trial of right is granted without a bond being tendered and approved by the court as required by Rev. St., § 1064, a subsequent order granting a new trial as of right, the bond having been duly tendered and approved, cures the defect, and it is immaterial that the first order was not formally set aside. *Martin v. Martin*, 118 Ind. 227; 20 N. E. Rep. 763.

The object of Rev. St. Ind., 1881, § 1065, providing that, if the application for new trial in ejectment is made after the term at which judgment was rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term next succeeding the granting of the application, is to prevent either party from forcing the other to trial during the term at which the application is granted, and does not authorize the vacation of an order granting a new trial, made at a former term, for failure to give the notice, trial not having been had. Following *Stanley v. Holliday*, 113 Ind. 525; 16 N. E. 513. *Nitche v. Earle*, 117 Ind. 270; 19 N. E. Rep. 749.

(3) IOWA.

New trials—When granted—Grounds of. In any of the cases provided for by this chapter, the court, in its discretion, may grant a new trial on the application of any party thereto, or those claiming under a party, made at any time within one year after the former trial, although the grounds required for a new trial in other cases are not shown; but only one such new trial shall be granted.¹

Notice of application to adverse party. If the application for a new trial is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term at which the action stands for trial.²

¹ 2 McClain's Statutes, Tit. XX, Chap. 2, page 857, Secs. 3268, 3269. Greater latitude is allowed in granting new trials under this section than in other actions, although the power given to the court to grant such new trials is purely a legal discretion. *White v. Poorman*, 24 Iowa, 108 (1867).

² 2 McClain's Statutes, 860. The fact that an equitable defense was set up and tried in such action, does not prevent the granting of a new trial. *Butterfield v. Walsh*, 25 Iowa, 263 (1868); *County, etc., v. I. F. & S. C. R. R. Co.*, 49 Iowa, 657 (1878). When an appeal is taken from a judgment in an action of right,

and the cause is remanded from the Supreme Court to the lower court for judgment in accordance with its opinion, the judgment so rendered is a judgment of the lower court, and a new trial may be granted in the same manner as if no appeal had been taken. *Butterfield v. Walsh*, 25 Iowa, 263 (1868). A motion was based upon a mistake in the production of the proper title papers on trial, and was sustained by several affidavits showing how the mistake occurred. It appeared that the title papers had been in the possession of one P. W. Potter, Esq., who had negotiated the purchase of the land in controversy from one LeClair and wife, and for

(4) KANSAS.

Another trial. In an action for the recovery of real property, the party against whom the judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.¹

No further trial. No further trial can be had in such action, unless, for good cause shown, a new trial be granted, or the judgment reversed, as in other actions.²

(5) MICHIGAN.

New trial, how granted. The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs, executors, administrators, or assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment and grant a new trial in such cause; and the court, upon subsequent application made within two years after the rendering of the second judgment in said cause, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial; but no more than two new trials shall be granted under this section.³

(6) MINNESOTA.

Second trial in actions of ejectment. Any person against whom a judgment is recovered in an action for the recovery

some reason had taken two deeds from him at the same time between the same parties, one of which gave to the plaintiff one fourth of the property, the other three eighths, which last one, covering the largest and all the interest which the plaintiff had in the land, the said Potter intended to give to the counsel who conducted the trial, but by mistake gave him the other, which was not known to the counsel, or discovered till after the trial, when the whole matter was very clearly shown by affidavits and the production of the second deed, but the court nevertheless refused to grant a new trial. In disposing of the matter on appeal, Lowe, C. J., said: We can scarcely imagine a stronger case for exercising such a discretion. The decision will therefore be reversed. *Floyd v. Hamilton*, 10 Iowa, 556 (1860).

¹ General Statutes of Kansas, Article 24, p. 1532, Sec. 599.

² *Ibid.*, Sec. 600.

³ Revised Statutes, Michigan, 1882, Chap. 269, Sec. 36.

of real property, may, within six months after written notice of such judgment, upon payment of all the costs and damages recovered thereby, demand another trial, by notice in writing to the adverse party, or his attorney in the action, and thereupon the action shall be retried and may be brought to trial by either party.¹

Same—Judgment on second trial—Restitution. The judgment given on a trial to be had under the last section shall be annexed to the judgment roll of the former trial, and the judgment last given shall be the final determination of the rights of the parties. If a prior judgment has been executed, restitution shall be ordered, as the last judgment may determine the rights of the parties, and the same may be enforced by execution.²

(7) NEW YORK.

New trial granted. The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs or assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment and grant a new trial in such cause. And the court upon subsequent application made within two years after the rendering of the second judgment in said cause, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial. But no more than two new trials shall be granted under this section.³

(8) NEBRASKA.

Two trials allowed. In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.⁴

¹ Statutes of Minnesota, 1878, p. 813, Chap. 75, Sec. 11.

² *Ibid.*, Sec. 12.

³ 2 Revised Statutes N. Y., 1849, 3d Ed., page 405, Sec. 38.

⁴ Compiled Statutes of Nebraska, Code Civ. Pro., page 822, Sec. 630.

Same. No further trial can be had in such action, except upon appeal, unless for good cause shown, as in other actions.¹

(8) WISCONSIN.

Second trial, when and how granted. The court in which any such judgment shall have been rendered, otherwise than upon failure to answer, shall, upon application of the party against whom the same was rendered, his heirs, devisees or assigns, within one year from the rendition thereof, vacate the judgment and grant a new trial, upon condition that all costs recovered thereby, or awarded upon affirmation of such judgment on appeal, or writ of error, be paid, and that the applicant execute and file an undertaking, with sufficient sureties, in such sum as the court shall direct, to the effect that he will pay all costs and damages which may be finally awarded the other party. The sureties shall justify their responsibility in the same manner as bail on arrest. The time during which the action may be pending on an appeal or writ of error from such judgment, either in the Supreme Court or the Supreme Court of the United States, or both, from the taking of the appeal or issuing the writ of error to the filing of the remittitur or mandate in the court below, shall not be reckoned a part of such one year. But one such new trial shall be granted.²

§ 47. **Motion to Vacate an Order for New Trial Under the Statute—Evidence.**—On a motion to vacate an order granting a new trial under the statute for non-compliance with the order in the payment of costs within the time allowed by the statute, the records, showing every material fact, are before the court, and no other evidence is necessary or required.³

¹ Ibid., Sec. 631.

² Revised Statutes Wisconsin, 1878, Chap. 133, Sec. 3092.

³ Setzke v. Setzke, 121 Ill. 30; 11 N. E. Rep. 915. That the prevailing party has, since the judgment, without notice of the intention of the defeated party to apply for a new trial, as of right, under Rev. St. Ind., 1881, § 1065, sold the land in controversy, is no ground for vacating the order

granting such new trial. Stanley v. Holliday, 113 Ind. 525; 16 N. E. Rep. 513. Nor is the fact that since the judgment that portion of the land the title where to was quieted in the defeated party, has been sold on a judgment against him, and the sheriff's certificate assigned to another person, before the commencement of the action, a ground for setting aside such order. Id.

There are no exceptions to the provisions of Code W. Va., C. 131, § 15, that not more than two new trials shall be granted to the same party in the same case. But if, on the face of the record, it appears that a verdict is void, and that no judgment could at common law be properly entered upon it, as for instance, because it was too uncertain, ambiguous, or defective, the court may declare such a verdict void, and direct a new trial, without regard to the number of new trials which may have been granted to the same party in the same case. *Williams v. Ewart*, 29 W. Va. 659; 2 S. E. Rep. 881.

CHAPTER XXVI.

SUMMARY PROCEEDINGS FOR THE RECOVERY OF THE POSSESSION OF REAL PROPERTY.

- § 1. Summary Remedies.
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- 3. Distinction Between a Forcible Entry and a Forcible Detainer.
- 4. Little Uniformity in the Statutes.
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§ 1. **Summary Remedies.**—Under the common law a party who possessed the legal right of entry might enter by force and defend his possession under his title, subject only to an indictment for a breach of the peace.¹ He was not

¹ Jackson v. Farmer, 9 Wend. (N. Y.) 201.

liable to an action of trespass for damages at the suit of the person in occupancy without right, and who was thus turned out of possession. This rule of law, though apparently harsh and tending to public disturbances and individual violence, is amply supported by authority.¹ It was the abuse of this summary power to right one's self by entry which gave rise to the numerous English statutes against forcible entry and detainer and from which our American statutes are in general derived.²

Our modern law makers have endeavored to legislate out of these statutes against forcible entries and detainers, a remedy more suitable to the times than the action of ejectment for the recovery of the possession of real property wrongfully withheld from the true owner in cases where only the question of possession is involved. As the statutes to prevent the forcible taking and detaining the possession of lands by fines or imprisonments were called statutes of forcible entry and detainer, so the summary remedy discussed in this chapter has come to be called in many of the States an action of forcible entry and detainer.

§ 2. Forcible Entry and Detainer—The Term Defined.—

A forcible entry and detainer is a violent taking and keeping possession by one of lands and tenements in the occupancy of another by means of threats, force or arms, and without authority of law. This is the definition given in the American and English Encyclopedia of law.³ The definition as given, however, applies to criminal prosecutions. The term as applied to civil actions in the United States indicates those summary proceedings for the recovery of the possession of real property in certain cases defined by statutes.

Illustrations.

The testimony of a prosecutor, that he found defendants standing on his property clearing a ditch that separated it from the adjoining premises, and that upon his ordering them to leave they chased him to within a short distance of his house, is sufficient to warrant a verdict of guilty of forcible entry. *State v. Talbot*, 97 N. C. 494; 2 S. E. Rep. 148 (1887).

¹ 3 Black. Com., 5, 174.

² *Jackson v. Farmer*, 9 Wend. (N. Y.) 201.

³ 8 Am. & Eng. Ency., 101, citing *State v. Gilbert*, 2 Bay (S. C.), 355; *People v. Fields*, 52 Barb. (N. Y.) 198;

Com. v. Shattuck, 4 Cush. (Mass.) 141;

Henderson's Case, 8 Gratt. (Va.) 708;

State v. Pridgen, 8 Ired. (N. C.) 84;

State v. Wilson, 3 Nev. 125; 1 Russell on Crimes, 421; 4 Blackstone, 148.

It need not be shown that defendants held possession by force or threats. *Giddings v. 76 Land and Water Co.*, 83 Cal. 96; 23 Pac. Rep. 196 (1890).

The action of forcible entry and detainer can not be maintained where defendant entered the premises in question by means of keys, and made no use of force or intimidation. *Livingston v. Webster* (Fla.), 8 So. Rep. 442 (1891); Am. Dig. 1891, page 1895.

Plaintiff's two salt blocks, about thirty feet apart, were held by separate leases from the State, and had been operated together, but could be used separately. Defendant, with the intention of taking possession of both, removed plaintiff's lock from one, replacing it with his own, and had a personal struggle with plaintiff, whom he notified that he took possession of both. *Held*, that the question of the forcible detainer of both blocks was for the jury, though they were not in the same inclosure. *Pharis v. Gere*, 112 N. Y. 408; 46 Hun (N. Y.), 678; 20 N. E. Rep. 551 (1889).

The action of forcible entry and detainer, under the Nebraska statute, being a civil remedy to recover the possession of premises unlawfully and with force withheld from the plaintiff, it will be sufficient to sustain the charge of forcible detainer that the party unlawfully in possession refuses to vacate the premises on lawful notice so to do. *Campbell v. Coonradt*, 22 Kan. 704, approved and followed. *Myers v. Koenig*, 5 Neb. 419; *Estabrook v. Hateroth*, 22 Neb. 281; 34 N. W. Rep. 634 (1887).

Where, in an action under Rev. St. Ind., § 5237, providing for the recovery of the possession of land lawfully obtained but unlawfully and forcibly withheld, the evidence shows that plaintiffs voluntarily gave defendant possession of the building, and that when possession was demanded he refused to surrender the premises, and peaceably retained possession, a verdict for defendant may be directed, as the essential element of force in retaining the possession is wholly wanting. *Gipe v. Cummins*, 116 Ind. 511; 19 N. E. Rep. 466 (1889).

In an action under Code Civil Proc. Utah, 1884, § 1033, defining forcible entry and detainer, it appeared that plaintiff had taken possession of a house and buildings, erected with his knowledge by defendant, and in which was personal property of defendant, though the premises at the time were vacant; that defendant subsequently entered the house by consent of plaintiff's agent, and then ordered said agent to leave, using rough language, but no force. *Held*, plaintiff's possession was tortious, and not peaceable, and the re-entry of the former possessor was not forcible; and, therefore, the requirements of the statute not being complied with, forcible entry and detainer would not lie. *Brooks v. Warren* (Utah), 13 Pac. Rep. 175 (1887).

§ 3. Distinction Between a Forcible Entry and a Forcible Detainer.—A forcible entry and a forcible detainer are in substance and in principle, as applied to civil remedies for the possession of real property, but one act, and are treated of as forcible entry and detainer,¹ though technically they are different. A forcible entry consists in taking posses-

¹ 8 Am. & Eng. Ency., 103.

sion of real property with or without force, without authority of law, or consent of the owner, while a forcible detainer is wrongfully withholding the possession upon which the entry has been made.¹

§ 4. **But Little Uniformity in the Statutes.**—In the statutes of the various States providing for the recovery of the possession of real property by summary proceedings, we shall find but little uniformity. In some, the common law remedy, by criminal proceedings, is preserved unchanged, and the unfortunate landlord is compelled to resort to the action of ejectment. In others the common law prosecution appears to have been tempered into a civil proceeding, but retaining all of its original characteristics, as for example, as the term implies, and as it anciently in fact was, there must be a forcible entry. When a person entered the house by night stealthily by means of keys, there certainly was force enough to make out the offense of burglary were the intent present, but not enough to constitute a forcible entry.²

In other States, entering against the will of the landlord and retaining possession of the premises, is sufficient. It need not be shown that the possession was held by force or threats.³ In some States the plaintiff must show that his premises have been entered upon by actual force, but in others this rule has been entirely dispensed with. The action then, as we shall treat it in this chapter, though retaining the name of forcible entry and detainer, is a convenient proceeding in the form of a modified and improved action of ejectment for the speedy recovery of the possession of real property when the possession and not the title is in dispute. The remedy, it may be said, has grown out of the action of ejectment by divesting it of all of its elements excepting its possessory character, and conferring the power to hear and determine it upon courts not of record and of inferior jurisdiction.

§ 5. **The Nature of the Action.**—The civil action of forcible entry and detainer is given for the purpose of protecting the possession of real property by affording to persons entitled to the possession a cheap and convenient remedy for recovering

¹ Dickinson v. Maguire, 9 Calif. 46. ³ Giddings v. 76 Land & W. Co.,

² Livingston v. Webster (Fla.), 8 83 Calif. 96; 23 Pac. Rep. 196 (1890).
So. Rep. 442 (1891).

the same. In certain cases when the title can not be brought into controversy and without a resort to the action of ejectment, the remedy in general applies to cases in which exist the relation of landlord and tenant, vendor and vendee, grantor and grantee, mortgagor and mortgagee, where the possession is withheld by one of the parties after the right to hold it has expired or been disposed of.¹

§ 6. **Purely a Civil Remedy—The Title Not Involved.**—The action of forcible entry and detainer is purely a civil remedy² and does not involve directly the title to the premises in dispute.³ The only questions involved in these proceedings are (1) whether the plaintiff was in possession of the premises, and (2) whether that possession has been forcibly or illegally invaded by the defendant and detained after the entry.⁴ The remedy deals only with the question of possession,⁵ leaving the question of title to be settled in the action of ejectment.⁶

In an action of forcible entry and detention, the mere filing by the defendant of an answer claiming title to the premises will not deprive the court of jurisdiction; but when it appears from the evidence that the question involved is one of title, and not for possession of the premises alone, the case will be dismissed. See *Pettit v. Black*, 13 Neb. 142; 12 N. W. Rep. 841; *Lipp v. Hunt*, 25 Neb. 91; 41 N. W. Rep. 143 (1889).

When the defendant pleads ownership of the premises, and offers evidence to prove that fact, the justice is bound to cease all proceedings and certify the case to the district court; and his subsequent judgment, on failure to certify the case, is *coram non judice*. *Murry v. Burris*, 6 Dak. 170; 42 N. W. Rep. 25, 1889.

Under Gen. St. S. C., § 1819, providing for the institution of proceedings before justices of the peace for the ejection of tenants who either hold over after the expiration of their lease or fail to pay rent, the jurisdiction of the justice is not ousted by raising the question of title. *Swygert v. Goodwin* (S. C.), 10 S. E. Rep. 933 (1890).

In the California statutory action of unlawful detainer, evidence of title is inadmissible, though it is offered as having some weight on the question of the existence of a lease. *Felton v. Millard*, 81 Cal. 540; 21 Pac. Rep. 533 (1890).

§ 7. **The Different Remedies Compared.**—The remedy of forcible entry and detainer at common law was purely criminal

¹ *Ragan v. Harrell*, 52 Miss. 818; ⁴ *Jamison v. Graham*, 57 Ill. 94
Bowers v. Cherokee, 45 Calif. 495; (1870); *McCartney v. McMullen*, 38
Wood v. Phillip, 43 N. Y. 132. Ill. 238 (1865).

² *Robinson v. Crummer*, 5 Gil. (Ill.) ⁵ *Cox v. Groshong*, 1 Pinney (Wis.),
218 (1848); *Thomas v. Sornberger*, 59 307.

Ill. 326 (1871).

³ *Smith v. Hollenback*, 51 Ill. 223 Ill. 290 (1863).
⁶ *Shundy v. School Directors*, 32
(1869).

in its nature; under the statutes it is a civil remedy for the recovery of the possession of real property. Upon the judgment in the civil proceeding a writ of restitution will be awarded,¹ but the judgment in the criminal proceeding is one of conviction upon which a writ of commitment, and not a writ of restitution, issues.² In many of the States the criminal remedy has fallen into disuse.³

§ 8. When the Action Will Lie.—The cases in which the action of forcible entry and detainer will lie for the recovery of the possession of real property is a matter of statutory regulation; at common law the action was purely of a criminal nature, but under the American statutes it is a civil remedy, the sole object of which is to recover a possession, which has been wrongfully withheld, and the only judgment that can be rendered, is that the plaintiff have restitution of the premises.⁴

The action as it exists in the United States is purely a statutory remedy and will lie only in the cases prescribed by the statute. As a fair illustration of these enactments we quote the statutes of Illinois:

§ 2. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided [by forcible entry and detainer]:

First. When a forcible entry is made thereon.

Second. When a peaceable entry is made and the possession unlawfully withheld.

Third. When entry is made into vacant and unoccupied lands or tenements without right or title.

Fourth. When any lessee of the lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise.

Fifth. When a vendee having obtained possession under a written or verbal agreement to purchase lands or tenements, and having failed to comply with his agreement, withholds possession thereof, after demand in writing by the person entitled to such possession.

Sixth. When lands or tenements have been conveyed by any grantor in possession, or sold under the judgment or decree of any court in this State, or by virtue of any sale in any mortgage or deed of trust contained, and the grantor in possession or party to such judgment or decree, or to such mortgage or deed of trust, after the expiration of the time of redemp-

¹ Robinson v. Crummer, 5 Gil. (Ill.) 218; Fuhr v. Dean, 26 Mo. 116; 69 326; Dutton v. Tracy, 4 Conn. 79; 8 Am. Dec. 484; Tucker v. Phillips, 2 Am. & Eng. Ency., 105. Met. (Ky.) 416.

⁴ Com. v. Shattuck, 4 Cush. (Mass.)

² State v. Walker, 5 Sneed (Tenn.), 141. 259.

tion, when redemption is allowed by the law, refuses or neglects to surrender possession thereof, after demand in writing by the person entitled thereto, or his agent.¹

Illustrations.

A party who goes into possession of land under a written contract for a conveyance, and fails to pay the first note for the purchase money, which note contained a stipulation that, upon such failure, the vendee should pay "customary rent," becomes the tenant of the vendor; and a purchaser under the foreclosure of the mortgage recorded prior to the execution of the contract of conditional sale, succeeding to the rights of the original vendor, may maintain unlawful detainer against such vendee to recover possession of the land. *Ish v. McRae*, 48 Ark. 413; 3 S. W. Rep. 440 (1887).

A lessee of an oil and gas lease for years can bring unlawful detainer against a lessee under a similar prior lease, which has been forfeited for breach of conditions. *Guffey v. Hukill* (W. Va.), 11 S. E. Rep. 754 (1890).

A was the owner of certain real estate which was sold at sheriff's sale to B. Subsequently to the sale B sold the property to C, the son of A, by written contract, and C paid some money on account. After this, B again sold the property to D, who persuaded A to become his lessee. A having died, letters of administration upon his estate were granted to E, his widow, and D brought an action, under the Pennsylvania act of 1863, against her, as administratrix of A, to recover possession of the property. Upon the trial the court permitted her to prove that she, as mother and lessee of C, held the property; that she did not claim under B or D; and that her claim was one made in her own right, and not as administratrix. The jury having rendered a verdict in her favor, judgment was entered thereon, which judgment was affirmed by a divided court. *Diefenderfer v. Caffrey* (Pa.), 9 Atl. Rep. 182; Am. Dig. 1887, 769.

The plaintiff, to whom certain land was conveyed, served the statutory notice on defendant, who had taken a lease of the premises for an indefinite period from his grantor to vacate at the close of one year from the date of the lease. The defendant recognized the right of the plaintiff as landlord by paying him rent. *Held*, in an action brought at the close of the year named to recover the premises, that there was evidence to support a verdict for plaintiff. *Swope v. Hopkins*, 119 Ind. 125; 21 N. E. Rep. 462 (1889).

Under Rev. St. Mo., § 2419, defining forcible entry and detainer, a plaintiff who has never had any actual possession, other than through his tenants and agents, can maintain the action against one who enters on and takes actual possession against plaintiff's will. *Coolbaugh v. Porter*, 33 Mo. App. 548 (1889).

It was the doctrine of common law from the time of William the Conqueror until the statutes of Richard the second, a period of nearly 300 years, that when a man had a right of entry he could make the entry with force and arms. But this rule having been found by experience to be very prejudicial to the public peace by affording to powerful men the right to eject their weaker neighbors under the pretense of feigned titles, it was thought necessary to restrain all persons, by severe laws, from the use of such violent methods. 3 Blackstone's Com., 5, 174; 8 Am. & Eng. Ency., 104; 3 Wait's Actions and Defenses, 395.

¹ L. 1881, p. 96; Legal News Ed., p. 83; R. S. 1845, p. 256, § 1; L. 1865, 108, § 4; L. 1871-2, p. 458, § 2.

The common law afforded no civil remedy against a person who, having a right, entered forcibly. *Tucker v. Phillips*, 2 Met. (Ky.) 416; *Fuhr v. Dean*, 26 Mo. 116; 69 Am. Dec. 484.

§ 9. **Where the Action Does Not Lie.**—These summary remedies are, as a general rule, not applicable to cases of peaceful entries by persons under color of title or as tenant of some person other than the plaintiff or his assignor, and who obtain or maintain their possession peaceably;¹ nor will the action lie against a mere trespasser, or where the entry is made under process of law.²

Illustrations.

Where a person has entered into the possession of premises peaceably and in good faith as the tenant of a purchaser from one who had previously made a forcible entry, the tenant or even his landlord, not being a privy to the wrongful act of the grantor, or having knowledge of it, is not liable to be turned out by an action of forcible entry and detainer. *Clark v. Barker*, 44 Ill. 349; *Ballance v. Curtenius*, 3 Gil. (Ill.) 449.

A sale of leased premises by the landlord puts the purchaser in no better condition with reference to the tenant than the landlord occupied, and where the landlord could not maintain forcible detainer, the purchaser can not. *Unger v. Bamberger*, 85 Ky. 11; 2 S. W. Rep. 498 (1887).

Plaintiff, by verbal contract, sold to defendant a tract of land, promising to make him a deed therefor, and defendant entered and took possession of the same under this contract. Defendant afterward several times demanded a deed from plaintiff, expressing his readiness and willingness to pay for the land; but upon plaintiff's failure to make the deed as he had promised, defendant took a deed for the same from a certain railroad company, who held the legal title thereto. In an action of unlawful detainer brought by plaintiff to recover the land, it was held that defendant was entitled to retain the possession, and that the action could not be maintained. *Ragsdale v. Phelps*, 90 Mo. 346; 2 S. W. Rep. 300 (1887).

One in possession of land under color of title, who is allowed by the owner to remain there during the remainder of the year under an agreement to secure the rent, and who subsequently refuses to give a written contract for the rent, can not be proceeded against in ejectment before a justice of the peace under Gen. St. S. C., § 1819, providing that "where tenants hold over after the expiration of their leases," etc., "or fail to pay the rent when it shall become due, upon the landlord entering and demanding possession, with a refusal to surrender, he may apply to a trial justice, who may eject him upon three days' notice." *Goodgion v. Latimer*, 26 S. C. 208; 2 S. E. Rep. 1 (1887).

Where there is a controversy as to the ownership of land, and a tenant is

¹ *People v. Fields*, 1 Lans. (N. Y.) 222; *Winterfield v. Stauss*, 24 Wis. 562; *Wyatt v. Monroe*, 27 Tex. 268; 394; *Farmer v. Hunter*, 45 Mich. 337; *Link v. Harrington*, 23 Mo. App. 429.
² *Castro v. Tewksbury*, 69 Calif. 429.
McHan v. Stansell, 39 Ga. 197.

in possession under one claiming to be owner, a third person who has had no prior possession, but who claims adversely to the landlord of the tenant, can not maintain forcible entry and detainer against such tenant until he has established his right in a court of competent jurisdiction. *Comstock v. Cole*, 28 Neb. 470; 44 N. W. Rep. 487 (1890).

Gen. St. S. C., §§ 2294, 2295, provide that "if any person be put out or disseized of any lands or tenements in forcible manner, or put out peaceably, and be afterward holden out with strong hand, * * * the party aggrieved in this behalf shall have an action against disseizor," and recover treble damages. Defendant, the owner of a sawmill, with the right to run a tramway connecting it with a railroad, laid a temporary iron rail track, and in doing so straightened the tramway. No objection was made at the time, but, when the defendant commenced to take up the track for the purpose of moving the mill, plaintiff gave notice that the track ran over a corner of his land, and that the rails, by being laid there, had become fixtures. *Held*, that the action of forcible entry and detainer would not lie against defendant for removing the rails, as plaintiff was not thereby disseized of any of his "lands or tenements." *DeLaine v. Alderman*, 31 S. C. 267; 9 S. E. Rep. 950 (1889).

In Nebraska, where the testimony showed that a party was in possession of real estate under a contract of purchase, an action of forcible entry and detainer will not lie to oust him from such possession. *Dawson v. Dawson*, 17 Neb. 671; 24 N. W. Rep. 339; *Railroad v. Skupa*, 16 Neb. 341; 20 N. W. Rep. 393; *Streeter v. Rolph*, 13 Neb. 390; 14 N. W. Rep. 166; *Petit v. Black*, 13 Neb. 154; 12 N. W. Rep. 841; *Worthington v. Woods*, 22 Neb. 230; 34 N. W. Rep. 368 (1887).

Defendant held under a contract for a deed, in case he should pay a certain sum by the first of the ensuing year. Interest was provided for on failure to pay at that time, and the vendor had an option to forfeit the contract on non-payment, and defendant was to have possession and the crops during the year. Defendant failed to make the payment by the time specified, but was allowed to remain in possession for some months afterward, when summary proceedings were instituted to recover the land. *Held*, that plaintiff could not recover, as defendant had become a tenant at will or by sufferance, and was entitled to three months' notice to quit, under How. St. Mich., §§ 5774, 8295, subd. 4. *Knight v. Hartman*, 81 Mich. 462; 45 N. W. Rep. 1008 (1890).

Where defendant's agent let her land to a tenant, who afterward collusively attorned to plaintiff, the holder of a tax deed to the premises, and defendant then re-entered peaceably with the tenant's assent, an action for unlawful entry and detainer can not be maintained. *Benjamin v. Reach*, 65 Miss. 347; 3 So. Rep. 657 (1888).

Where the owner of an unfinished livery stable could not agree with one seeking to rent it, and, after the time when the proposed lease was to go into effect, rented it to another, who went into possession, the proposed lessee did not acquire the right to maintain an action against the party so entering, for unlawful entry and detainer, by hitching horses in the unfinished stable. *Blake v. McCroy*, 65 Miss. 443; 4 So. Rep. 339 (1888).

Where a party in possession of land has an interest in the land itself, which only a court of common law jurisdiction can determine, forcible en-

try and detainer will not lie against him. *Malloy v. Malloy*, 24 Neb. 766; 40 N. W. Rep. 285 (1888).

Summary proceedings under How. St. Mich., § 8295, for the possession of premises, can not be maintained where it appears that each party claims the paramount title from a third person. *Hill v. Olin*, 82 Mich. 643; 46 N. W. Rep. 1038 (1890).

§ 10. Notice to Quit and Demand for Possession.—The rules of law relating to the notice to quit and demand for possession have been generally discussed under the titles of ejectment between landlord and tenant and adverse possession; the statements of the law there made apply with equal force to summary proceedings for the recovery of the possession of real property between landlord and tenant and all the persons sustaining a like relation in which the remedy is given.¹

At the expiration of a notice to quit, the tenant becomes a trespasser, and the landlord may enter the premises during the tenant's absence, take possession, and eject the tenant's goods, without legal process, and the tenant has no right to re-enter. Following *Souter v. Codman*, 14 R. I. 119. *Freeman v. Wilson*, 16 R. I. 524; 17 Atl. Rep. 921 (1889).

In an action of ejectment where defendants have, from long prior to the commencement of the action, denied and resisted plaintiff's claim to possession, it is such a disclaimer of the relation of landlord and tenant as authorizes ejectment without notice. *Evans v. Enloe*, 70 Wis. 345; 34 N. W. Rep. 918 (1887).

Under Rev. St. Ind., § 5208, providing that all general tenancies in which premises are occupied by the consent, expressed or implied, of the landlord, shall be deemed tenancies from year to year, and section 5209, requiring tenancies from year to year to be determined by three months' notice, given to the tenant prior to the expiration of the year—where a father places his son in possession of premises, and allows him to remain for several years, and after the son's death tells his widow that for that year, at least, she and the children should continue in possession as before, having allowed that farm year to pass and another to begin, he can not determine her right to the possession by a demand of rent, but must give the notice required by the statute. *Tobin v. Young* (Ind.), 17 N. E. Rep. 625 (1889).

Where the action of unlawful detainer will lie under the Tennessee statutes, no other notice than the suing out of the writ is necessary. *Mallory v. Hananer Oil Works*, 2 Pickle (Tenn.), 598; 8 S. W. Rep. 396.

The "demand in writing" to deliver possession, which, under Code Ala. 1876, § 3697, must be made as preliminary to an action of unlawful detainer,

¹ Notice is not necessary to terminate a tenancy, where defendant in his answer denies plaintiff's title, and alleges ownership in himself. *Von Glahn v. Brennan*, 81 Cal. 261; 22 Pac. Rep. 596 (1889). In *Michigan*, where a tenant holds over the second year under a verbal lease, the landlord may have restitution of the premises at the end of the second year without formal notice to quit. *Teft v. Hinchman*, 76 Mich. 672; 43 N. W. Rep. 680 (1889).

is distinct from the notice to quit which is necessary to terminate the tenancy of a tenant from month to month. Both are required to establish a right of action against such a tenant. *McDevitt v. Lambert*, 80 Ala. 536; 2 So. Rep. 438 (1887).

§ 11. **Pleadings—The Complaint.**—As a general rule written pleadings are not required in courts of inferior jurisdiction, but in actions of forcible entry and detainer an exception to this rule is found in the law requiring the complaint to be in writing. The action being a statutory remedy existing wholly by virtue of legislative enactments, the rule in regard to the complaint differs widely in the different States. As a general proposition it may be stated that the complaint must contain all the essential requirements of the statute.¹ It is usually in the form of a declaration, though sometimes in that of an affidavit. It should set forth the venue and facts sufficient to give the court jurisdiction. It must contain the names of the parties, a reasonably certain description of the premises and the plaintiff's estate therein,² and an allegation that the defendant entered and unlawfully withholds the possession thereof from the plaintiff.³ The sufficiency of the complaint is in general governed by the rules of pleading.⁴

Illustrations.

A mere recital that defendant was a tenant, and had been notified to quit three months before the expiration of the lease, is inadequate to entitle plaintiff to oust defendant from the premises. *Hourner v. Witherill* (Pa.), 10 Atl. Rep. 40.

In forcible entry and detainer in justice's court, a complaint is sufficient which avers that the defendant rented the premises of the plaintiff at \$6.25 per month, payable in advance; that on a certain day there became due \$6.25 on account of one month's rent from that day, and that since then the defendant has been unlawfully in possession of the premises because of the non-payment of said rent. *McNatt v. Grange Hall Ass'n of Indian Creek Grange No. 828*, P. of H. (Ind.), 27 N. E. Rep. 325 (1891).

Where the description of the premises in a complaint for forcible entry is shown by the testimony of a surveyor to be susceptible of being easily and definitely located, such description is sufficiently definite. *Stillman v. Palis*, 134 Ill. 534; 25 N. E. Rep. 786 (1890).

¹ *Clark v. Gage*, 19 Mich. 507; *Moore* 230; *Grant v. Marshall*, 12 Neb. 488; *v. Del Volle*, 28 Calif. 170; *Jonsen v. Nason v. Best*, 17 Kan. 408; *Sullivan Nabring*, 50 Ala. 397; *Ich v. Chilton*, v. Ellison, 8 W. Va. 308; *Applegate* 26 Mo. 256; *Simmons v. Marshall*, 3 v. Applegate, 16 N. J. L. 321; *Klingen v. Smith*, 84 Ind. 331.

² *Murphy v. Lucas*, 2 Ohio. 255; ³ *Bliss v. Winston*, 1 Ala. 344; *Blaco Treat v. Bent*, 51 Me. 478; *Silvey v. v. Haller*, 9 Neb. 149.

Summer, 61 Mo. 253; *Cairo, etc., R. Co. v. Wiggins Ferry Co.*, 82 Ill. ⁴ *Clark v. Gage*, 19 Mich. 507.

A complaint describing the premises as "the message or store-house and buildings of plaintiff, and the lot of land whereon the same is located," 15x32 feet, "situate in the township of * * *, on the south side and edge of the south branch of Great Pond, and a short distance westward of the west line of Central avenue, which runs from Asbury avenue, in West Park, to said Great Pond," is sufficient, under the statute (Revision N. J., p. 440, § 7) requiring the complaint to specify the lands, etc., forcibly entered upon and detained. *O'Hagen v. Crossman*, 50 N. J. L. 516; 14 Atl. Rep. 752.

In proceedings under Pub. St. Mass., C. 175, providing a summary process for recovering lands or tenements, the description of the premises in the writ as on a wrong street, is not fatal, if the description as a whole is sufficient to clearly describe the premises. *Pray v. Wasdell*, 146 Mass. 324; 16 N. E. Rep. 266 (1889).

There can be no recovery of any premises not described in the complaint. *Lanne v. Buse*, 70 Mo. 463.

In a complaint for forcible entry and detainer it is not necessary to allege that the notice to quit was in writing, although on the trial it must be proved to be so; and an allegation that "plaintiff served notice on the defendant, describing said premises to defendant," is sufficient. *Hitchcock v. McKinster*, 21 Neb. 148; 31 N. W. Rep. 507 (1887).

An allegation in a complaint in an action of unlawful detainer that defendant "has heretofore been a tenant at will of said real property, and that said complainant is entitled to the actual possession of the same," is insufficient to show the relation of landlord and tenant between the parties, under Rev. St. Tex., Art. 2445, requiring the complaint "to state the facts which entitle the complainant to the possession, and authorize the action." *Gulledge v. White*, 73 Tex. 498; 11 S. W. Rep. 527 (1889).

An affidavit under which a justice of the peace assumed jurisdiction of landlord and tenant proceedings, alleged that T. was in possession of premises owned by deponent, under an agreement between A., the former owner, and said T., and that the possession was continued to a certain time by consent of deponent and still continues, but without his permission. *Held*, that the affidavit failed to show the relation of landlord and tenant between deponent and T., and was insufficient to confer jurisdiction. *State v. Staiger*, 52 N. J. L. 350; 19 Atl. Rep. 387 (1890).

Where an action for forcible entry is brought in an adjoining precinct to that in which the premises are situated, and in which there is no justice of the peace qualified to act, as allowed by Comp. Laws N. M. 1884, § 2425, the complaint must allege that there is no such justice in the precinct where the premises are situated. *Sanchez v. Candelaria* (N. M.), 23 Pac. Rep. 239 (1890).

The landlord and tenant act (Rev. St. D. C., §§ 680, 681, 684, 686, 688), which provides that all tenancies at sufferance may be determined by thirty days' written notice to quit, and which does not require the relation of landlord and tenant to be set forth in the complaint, is satisfied, at least so far as to support the jurisdiction of the justice, by allegations that complainant is entitled to the possession of the premises, that they are detained from him and held without right by defendant, that defendant is his tenant at sufferance, and that his tenancy has been terminated by due notice to quit. *Harris v. Barber*, 129 U. S. 366; 9 S. Ct. Rep. 314 (1889).

A complaint alleging the date of the forcible entry as February 15th, without naming the year, though the complaint itself be dated February 19, 1886, is defective; but where the objection is not made until after defendant has appeared, and consented to a trial on the merits, and not until after the jury are sworn, it will be regarded as waived. *O'Hagan v. Crossman*, 50 N. J. L. 516; 14 Atl. Rep. 752.

§ 12. **The Question of Possession.**—It is not an easy question to decide what particular acts constitute an actual possession of land as against a stranger or trespasser, but it may be stated as a general rule that it is sufficient if the premises are appropriated to the individual use in such a manner as to apprise the community or neighborhood that the land is in the exclusive use and enjoyment of another.¹ The question of possession will be found discussed in the chapters entitled "Possession" and "Adverse Possession."

Illustrations.

To maintain the action, it is not necessary that the plaintiff should have a *pedis possessio* (a foothold, an actual possession); it is sufficient if the premises are used and occupied for some useful purpose; but if such possession is joint, as to different persons, neither one will be entitled to the joint possession. *Jamison v. Graham*, 57 Ill. 94.

Building a few rods of fence, cutting some brush, or plowing a few furrows, will not constitute such possession as to enable plaintiff to maintain forcible entry and detainer against a tenant who has been in possession for more than one year under a written lease from one who claimed adversely to plaintiff. *Gallagher v. Connell*, 23 Neb. 391; 36 N. W. Rep. 566 (1888).

Civil Code Ky., § 452, defines a forcible entry as an entry without the consent of the person having actual possession, and, as to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent. *Held*, that actual possession is necessary to maintain the action, and neither title, right of possession, nor constructive possession, is sufficient. *Dills v. Justice* (Ky.), 9 S. W. Rep. 290; Am. Dig. 1888, p. 563.

The constructive possession of one who has been disseized by an adverse entry is not sufficient to support the action. *Gulledge v. White*, 73 Tex. 498; 11 S. W. Rep. 527 (1889).

In unlawful detainer, where it appears that plaintiff was in possession when the action was brought, judgment should be for defendant. *Hurst v. Dulany*, 84 Va. 701; 5 S. E. Rep. 802 (1888).

Evidence that defendant had held uninterrupted possession of the premises for several months; that plaintiff then took possession by force, during defendant's absence, and sought to maintain it by force; and that defendant brought ejectment, but before the action was determined regained peaceable possession and has ever since retained it, is admissible to show the character of the possession relied upon by plaintiff to maintain the action. *Murry v. Burris*, 6 Dak. 170; 42 N. W. Rep. 25 (1889).

¹ *Pearson v. Herr*, 53 Ill. 144 (1870).

Actual possession may exist by proof of something short of an actual residence on the land or inclosing by a fence, as in case of a wood lot, uninclosed, but used as an adjunct to a farm from which the latter is supplied with timber, wood and rails. *Pearson v. Herr*, 53 Ill. 144.

Possession under claim of title is sufficient to sustain an action of forcible entry and detainer against one entering without any title. *Fore v. Campbell*, 82 Va. 808; 1 S. E. Rep. 180 (1887).

Code Civil Proc. Cal., § 1160, subd. 2, provides that every person shall be guilty of forcible detainer who unlawfully enters on real property during the absence of an occupant who, within five days preceding such unlawful entry, was in peaceable and undisturbed possession of the land. *Held*, that plaintiffs need not prove their actual, personal presence on the land for five days continuously preceding the unlawful entry. *Giddings v. 76 Land & Water Co.*, 83 Cal. 96; 23 Pac. Rep. 196 (1890).

Evidence that plaintiffs have been in the exclusive possession of the land in dispute for three years, no one interfering with them except once, when defendants came and got some hay, and that defendants entered and took possession during the temporary absence of plaintiffs, without their consent and against their will, and have ever since retained possession, is sufficient to support a finding that plaintiffs were in the peaceable, actual, and undisturbed possession, and that defendants unlawfully entered. *Giddings v. 76 Land & Water Co.*, 83 Cal. 96; 23 Pac. Rep. 196 (1890).

Where the land is used in the same manner that owners of land of like character in the neighborhood commonly use theirs, the fact that it is not inclosed is immaterial. *Giddings v. 76 Land & Water Co.*, 83 Cal. 96; 23 Pac. Rep. 196 (1890).

§ 13. Possession in the Defendant.—The forcible entry or the wrongful detaining of the possession of real property from the true owner is the gist of the action of forcible entry and detainer. Possession in the defendant at the time of bringing the action is therefore one of the essential elements of the plaintiff's case and the burden is upon him to show such possession unless the same is admitted by the pleadings.¹ In general the acts which establish the fact of the forcible entry or detainer are, of themselves, sufficient evidence of the possession in the defendant.²

§ 14. The Title May Be Indirectly Involved.—The general rule of law is that the title is not involved in these summary proceedings to recover the possession of real property. Such proceedings are usually had in justices' courts and other courts of inferior jurisdiction to which it has never been the policy of the law to submit for adjudication the settlement of titles

¹ *Bell v. Cowan*, 34 Mo. 251.

Thompson v. Amey, 12 Ad. & E. 476;

² *Porter v. Bleiler*, 17 Barb. (N. Y.) 149; *Leitch v. Boyington*, 84 Ill. 179;

to real estate. Titles are sometimes, however, indirectly involved in these proceedings, and the deeds and title papers of the plaintiff are admissible in evidence for the purpose of establishing the extent of his possession, the boundaries of the land claimed, or the intention with which the party entered.¹

In the California statutory action of unlawful detainer, evidence of title is inadmissible, though it is offered as having some weight on the question of the existence of a lease. 21 Pac. Rep. 533, affirmed. *Felton v. Millard*, 81 Cal. 540; 22 Pac. Rep. 750 (1890).

§ 15. Parties Plaintiff.—As a general rule the person who has been deprived of his possession and who has a present legal right to the possession is the proper person to commence the action as plaintiff, and it is immaterial in whatever character or capacity his possession has been held or right of possession exists.²

§ 16. When the Owner Parts with the Reversion.—The right to bring the action is unquestionably in the person entitled to the possession, because he is the person injured. As against a tenant the person injured must be either the landlord or his legal representative, by assignment or otherwise. If the landlord has alienated the reversion during the term, then his alienee is entitled to the possession at its termination, and is the injured party by the holding over, and he should bring the action.³

§ 17. Principal and Agent as Plaintiffs.—The possession of an agent is in law the possession of his principal. But he may, nevertheless, acquire such a possession of the premises

¹ *Pearson v. Herr*, 53 Ill. 144 (1870); *Patchin*, 4 Mo. App. 567; *Hoffman v. Turney v. Chamberlain*, 15 Ill. 273; *Harrington*, 22 Mich. 52; *Rice v. Dill v. Hubbard*, 21 Ill. 328; *Conway Brown*, 77 Ill. 549; *Coonrad v. Campbell*, 29 Kan. 391; *Chiles v. Stephens*, 48 Calif. 361; *Anderson v. Mills*, 40 Ark. 192; *Camley v. Stanfield*, 10 Tex. 546; 60 Am. Dec. 219; *Winterfield v. Stauss*, 24 Wis. 394; *Silvy v. Summer*, 61 Mo. 253; *Turnley v. Hanna*, 82 Ala. 139; *Settle v. Settle*, 10 Humph. (Tenn.) 504; *Clymer v. Powell*, 56 Miss. 672; *Emerick v. Tavener*, 9 Gratt. (Va.) 220; 58 Am. Dec. 217.

² *Walker v. Thayer*, 113 Mass. 36; *People v. Fulton*, 11 N. Y. 94; *Baker v. Cooper*, 57 Me. 338; *Martin v.*

³ *Lewis v. Smith*, 2 Litt. (Ky.) 294; *Yoder's Heirs v. Easley*, 2 Dana (Ky.), 245; *Dudley v. Lee*, 39 Ill. 339 (1866); *Ball v. Chadwick*, 46 Ill. 28 (1867); *Mueller v. Newell*, 29 Ill. App. 192 (1888).

as will in law enable him to maintain an action of forcible entry and detainer for the recovery of the possession in his own name. The question being one of possession and not of title, for example, where a personal representative has been in the actual possession of premises, he may bring the action either in his representative or individual character.¹

A person who is in possession of premises under an agreement to keep possession of them for the owner, has such an interest as will enable him to maintain an action of forcible entry and detainer. *House v. Camp*, 32 Ala. 541.

An agent shown to have acted as such for many years in renting and managing the land for the owner, his mother, can recover its possession from trespassers in a summary action brought under 18 St. S. C., p. 556, providing an "expeditious mode of ejecting trespassers," against persons who took possession of the land after plaintiff's tenant moved out. *Bradley v. Bell* (S. C.), 12 S. E. Rep. 1071; Am. Dig. 1891, p. 1895.

§ 18. A Purchaser Under a Sale, Mortgage or Deed of Trust.—In many States there are statutes providing that when real property has been sold under a power of sale contained in mortgages and trust deeds, and the time for redemption, if any is allowed by law, has expired, the purchaser, after a demand in writing, may recover the possession of the premises in an action of forcible entry and detainer. In these cases the burden of proof is upon the person bringing the action to show the mortgage or deed of trust, and the deed by the mortgagee or trustee under the power of sale to himself.² In an action at law a deed made by the proper person under a power of sale in a mortgage or trust deed is conclusive evidence of the sale under his power and it can not be contradicted in a court having no equity jurisdiction or proved to have been executed in violation of law.³

Where land was sold under execution issued upon a judgment against A, and B, his wife, and C, after A had placed the title fraudulently in his wife, and D afterward recovered a judgment against A alone, and under execution thereon redeemed from the prior sale and became the purchaser, and procured a decree finding the title to the land was in A and not B, it was held that D, after taking a sheriff's deed, might maintain forcible detainer for the land against any one succeeding to the possession under A.

¹ *Spear v. Lomax*, 42 Ala. 576; 8 (Bump's Ed.), 332; *Story's Eq. Jur.*, Am. & Eng. Ency., 133. Sec. 437; *Taylor v. King*, 6 Munf. (Va.)

² *Windett v. Hurlbut*, 115 Ill. 403 358; 8 Am. Dec. 748, note; *Windett v. Hurlbut*, 115 Ill. 403 (1885).

³ *Kerr on Fraud and Mistake*

and B, or either of them, after the first sale. *Kratz v. Buck*, 111 Ill. 43 (1884).

Where the beneficiary in a deed of trust purchases the property at sale on foreclosure, and enters into possession by tenant, and pays taxes on the land, he may maintain an action for unlawful entry and detainer in Mississippi against the mortgagor, who subsequently demands and receives possession from the tenant. *Parker v. Eason* (Miss.), 8 So. Rep. 844; Am. Dig. 1891, page 1895.

The remedy of forcible detainer given by statute in favor of a purchaser at a judicial sale after the time of redemption has expired, is not restricted to the nominal party against whom the judgment is obtained, but may be employed against any one who, either before or after the time of redemption has expired, obtains possession from the defendant in the judgment or decree. *Kratz v. Buck*, 111 Ill. 41 (1884).

In an action of forcible entry and detainer, brought under the sixth clause of Sec. 2, Chap. 57, of the Revised Statutes of Ill., 1874, giving that remedy in favor of a purchaser under a deed of trust, the plaintiff gave in evidence, on the trial, the deed of trust and the deed by the trustee to himself. The defendant offered parol evidence to prove that the trustee, in fact, made no sale, that the plaintiff paid nothing for the property, and that it was worth \$30,000, and constituted defendant's homestead, which the court refused to hear: *Held*, that the ruling was clearly right. *Windett v. Hurlbut*, 115 Ill. 403 (1885).

§ 19. A Purchaser at a Judicial Sale.—Under a statute providing that when lands or tenements have been sold under the judgment of a court of competent jurisdiction, and the time for redemption, when redemption is allowed by law, has expired, the possession of the premises sold may be recovered in an action of forcible entry and detainer, the purchaser at the sale may maintain the action after a demand in writing and a refusal to surrender the same. And whether he brings the action against the judgment debtor or one succeeding to his rights and possession, the burden of proof is upon the plaintiff to show a valid judgment, execution and sheriff's deed.¹

In an action for forcible entry, the records of proceedings under which defendant secured title to the land on which the entry was committed are admissible, for the purpose of showing the extent of possession. *Dills v. Justice* (Ky.), 9 S. W. Rep. 290; Am. Dig. 1888, p. 563.

While it is true that the question of title can not arise on the trial of an action of forcible detainer, nevertheless a purchaser at a judicial sale of land can not recover against the judgment debtor, or one succeeding to his

¹ *Kratz v. Buck*, 111 Ill. 45; *Womac* 33 Ark. 682; *Barto v. Abbe*, 16 Ohio, v. Powers, 50 Ala. 55; *Woodside v.* 408; *Lehman v. Whittington*, 8 Ill. Ridgeway, 126 Mass. 292; *Liss v. Wil-* App. 374.
coxen, 2 Col. 85; *Necklace v. West*,

rights and possession, unless he offers in evidence a valid judgment, execution and sheriff's deed. These are indispensable requisites to a recovery, for the reason that a sale of the land under a judgment, and a failure to redeem, must be shown. In such case the judgment, execution and sheriff's deed are evidence that the land has been sold and that there has been no redemption. *Kratz v. Buck*, 111 Ill. 45.

The purchaser of land at a sheriff's sale can not recover the possession from one in possession under a mortgage, executed by the judgment debtor, prior to the judgment under which his title is obtained, even though the mortgagee entered after the sheriff's sale under an arrangement with the mortgagor to allow rents by way of credits on the mortgage debts. *Dickason v. Dawson*, 85 Ill. 53.

§ 20. **The Vendee of Lands as Plaintiff.**—Under statutes providing a summary remedy in favor of the grantee for the recovery of the possession of lands or tenements conveyed to him by a grantor in possession, the grantee may maintain the action of forcible entry and detainer against the grantor, and and this is true where the grantor was possessed of only an undivided half, but his deed purported to convey the whole estate.¹

A grantee may maintain forcible entry and detainer against his grantor, tho' latter not defending under any other title and his deed purporting to convey the whole estate. *Jewett v. Mitchell*, 72 Me. 28.

§ 21. **A Tenant as Plaintiff.**—In order to recover in an action of forcible entry and detainer, it is incumbent upon the plaintiff to show that he was in the actual possession of the premises at the time of the alleged forcible entry.² If at the time of the alleged forcible entry the premises were in the actual possession of a tenant, then the tenant and not the landlord is the proper person to bring the action.³

§ 22. **Tenants in Common as Plaintiffs.**—The action of forcible entry and detainer may be maintained by joint tenants and tenants in common, or by one or more of them, as the case may require,⁴ and one tenant in common may sue in this

¹ *Jewett v. Mitchell*, 72 Me. 28; 5 Calif. 113; *Bennett v. Montgomery*, Purdy v. Rakestraw, 13 Ill. App. 8 N. J. L. 48; *Holderman v. Middleton*, 6 Bush (Ky.), 44; *Hughes v. Divine v. Brown*, 35 Ala. 596.

² *Mann v. Brady*, 67 Ill. 95 (1873); *Temple*, 12 B. Mon. (Ky.) 198.

Dudley v. Lee, 39 Ill. 339.

⁴ *Wood v. Phillips*, 43 N. Y. 152;

³ *McCartney v. Anderson*, 49 Mo. Robe v. Tyler, 10 Smed. & M. (Miss.) 456; *Mann v. Brady*, 67 Ill. 95; *Langworthy v. Myers*, 41 Iowa, 18; *Hays* (Tenn.), 7; *Bowers v. Cherokee*, 45 v. Porter, 27 Tex. 92; *Treat v. Stewart*, Calif. 495.

form of action without joining his co-tenant.¹ But it seems that a joint warrant of forcible entry in favor of three tenants in common can not be maintained when two only have the title.²

§ 23. **Heirs at Law as Plaintiffs.**—When the landlord dies during the term for which he has demised lands or tenements, his heirs at law become *eo instanti* landlords of the tenant, and have such a right to the possession as will enable them to maintain any action for the recovery of the possession which their ancestor could have maintained had he been living. And the fact that the personal representative of the ancestor might intervene for the purpose of subjecting the land or its issues to the decedent's debts, will not affect the right of the heirs to maintain the action, especially where he has taken no steps to do so.³

When a person in possession of land by his tenant dies pending the term, his heirs at law become *eo instanti* landlords of such tenant, and, as such, have such a possession of the land as will entitle them to maintain an action of unlawful detainer against one who wrongfully takes possession of it. *Kellum v. Balkum* (Ala.), 9 So. Rep. 463; Am. Dig. 1891, p. 1896.

§ 24. **Evidence on the Part of the Plaintiff.**—It is incumbent on the plaintiff to prove that his possession has been invaded, that the premises of which he was in possession have been forcibly entered, or that the possession of the same has been wrongfully detained from him,⁴ the description of the premises in question⁵ and the date of the forcible entry or detainer, and that the defendant was still detaining the premises at the time of the commencement of the suit.⁶

When the action is brought by a landlord against a tenant, the burden is upon the plaintiff to show the determination of the tenancy either by expiration of the term or by the service

¹ *Jones v. Phillips*, 10 Heisk. (Tenn.) 562; *Turner v. Lumbrick*, 1 Meigs (Tenn.), 7.

² *Thomas v. Jones*, 2 A. K. Marsh. (Ky.) 356.

³ *Kellum v. Balkum* (Ala.), 9 So. Rep. 463 (1891).

⁴ *Stiles v. Hamer*, 21 Conn. 507; *Davis v. Ingersoll*, 3 Doug. (Mich.) 372; *Latimer v. Woodward*, 2 Doug. (Mich.) 368; *Reed v. Rawson*, 2 Litt. (Ky.) 189. Where the issue on a plea in

abatement in an action of forcible detainer is found by the court, on the trial of an appeal from a justice of the peace, in favor of the plaintiff, it is error to render judgment against the defendant on the merits, without evidence showing his right to recover. *Steele v. Grand Trunk Junction Ry. Co.*, 125 Ill. 385.

⁵ *Cummins v. Scott*, 20 Calif. 83.

⁶ *Hoffman v. Harrington*, 25 Mich.

of a notice to quit or demand for possession or in some other legal manner,¹ as well as the tenant's refusal or neglect to surrender the possession and his holding over.² The relation of landlord and tenant must also be established as an essential element of the plaintiff's case.³

When the action is in a court of inferior jurisdiction the plaintiff must show the facts necessary to give the court jurisdiction, for nothing is presumed in favor of the jurisdiction of these courts.⁴

§ 25. Parties Defendant.—As a general rule of law the person who is in the actual possession of the premises in question is the proper party to be made defendant. This person is in general the disseizor, but the action may be maintained against his representatives as well as against all persons in possession under him.⁵

§ 26. Persons Holding Jointly.—The action may be maintained against all persons who jointly make a forcible entry and detainer, but it can not be maintained jointly against persons who enter and hold in severalty, for the reason that courts of law will not take cognizance of separate causes of action against different parties in the same suit.⁶

A wife is properly joined with her husband as defendant in an action for forcible entry and detainer, where it appears that they entered on the premises together, and together withhold possession from plaintiff. *Porter v. Murray* (Cal.), 12 Pac. Rep. 425 (1887).

Under Rev. St. Ill. C. 57, § 15, which provides that, whenever possession shall be divided among persons with or other than the lessee, all such persons may be joined as defendants in an action by the lessor for forcible entry and detainer, and the recovery against them shall be several, according to their actual holdings, a lessee who has delivered possession of the entire premises to his sub-lessees may be joined as a defendant with them, and judgment entered against them jointly for possession of the entire premises. *Espen v. Hinchcliffe*, 131 Ill. 468; 23 N. E. Rep. 592 (1890).

§ 27. Persons Holding Under a Tenant.—The action of forcible entry and detainer lies in all cases where a tenant

¹ *Sullivan v. Carey*, 17 Calif. 80; 549; *Kelly v. Teague*, 63 Calif. 68; *Hersey v. Westover*, 11 Ill. App. 197. *Orrick v. St. Louis*, 32 Mo. 315;

² *Murphy v. Dwyer*, 11 Ill. App. 246; *Fogle v. Chaney*, 12 B. Mon. (Ky.) 138; *Russell v. Desplaines*, 25 Ala. 414; *Bird v. Fannon*, 3 Head (Tenn.) 129.

³ *Snydecker v. Quick*, 12 N. J. L. 414; *Bird v. Fannon*, 3 Head (Tenn.) 129; 8 Am. & Eng. Ency., 138.

⁴ *Liss v. Wilcoxon*, 2 Colo. T. 85.

⁵ *Reynolds v. Thomas*, 17 Ill. 207

⁶ *Rooney v. Gillespie*, 6 Allen (1855); *Gould v. Hendrickson*, 9 Ill. (Mass.), 74; *Rice v. Brown*, 77 Ill. App. 171.

holds over after the expiration of his term, or after his tenancy has been determined by forfeiture, or in any other legal manner; and in these cases the tenant, if in possession, is the proper party to be made defendant;¹ but if any other person is in possession under him as a sub-tenant, such person stands in the same relation to the landlord as the tenant, and is a proper party defendant.²

A purchaser claiming adversely to the landlord of the tenant's possession, takes only the rights of such tenant, and his possession is that of the landlord. *Green v. Wilson* (Ky.), 2 S. W. Rep. 564 (1887).

An under tenant, in possession of demised premises under a lease from the original tenant, can not be lawfully dispossessed in forcible entry and detainer proceedings by the landlord against the original tenant, and to which such under tenant is not made a party. *Bagley v. Sternberg*, 34 Minn. 470.

When a landlord recovers a judgment for the possession of the premises in an action of forcible entry and detainer, against his tenant, a sub-tenant who was not made a party to such judgment can not be put out of possession under the writ, unless he entered into possession during the pendency of the suit. *Leindecker v. Waldron*, 52 Ill. 283 (1869); *Clark v. Baker*, 44 Ill. 349; *Reed v. Hawley*, 45 Ill. 41.

It is a principle of universal law that a person can not be turned out of his possession by virtue of a judgment and execution in a proceeding to which he was not made a party, unless, of course, such person has entered upon the possession *pendente lite*. *Brush v. Fowler*, 36 Ill. 56.

§ 28. Between Joint Tenants and Tenants in Common.—

In law the possession of one joint tenant or tenant in common is the possession of all; and for the reason that each joint tenant or tenant in common is, in the absence of an agreement to the contrary, entitled to a like possession, it follows that one can not maintain the action of forcible entry and detainer for the exclusive possession of the premises against his companions in the estate.³ But the action will usually lie in favor of a joint tenant or a tenant in common, where he has been deprived by his companions of his possession or participation in the common right.⁴

§ 29. Proceedings When the Question of Title Arises.—

The question of title is not involved in these proceedings and

¹ *Casey v. King*, 98 Mass. 503; *Kelly v. Teague*, 63 Calif. 68; *Wheeler v. Cowan*, 25 Me. 283; *Flag v. Ricks*, 11 Ark. 451; *Gray v. Nesbitt*, 2 A. K. Marsh. (Ky.) 35.

² *Fogle v. Chaney*, 12 B. Mon. (Ky.) 138; *Reed v. Hawley*, 45 Ill. 40; *Bird v. Fannon*, 3 Head (Tenn.), 12; 8 Am. & Eng. Ency., 138.

³ *Jamison v. Graham*, 57 Ill. 94; *Mason v. Finch*, 1 Scam. (Ill.) 495.

⁴ *Presbrey v. Presbrey*, 13 Allen (Mass.) 281 (1886); *Mumford v. Brown*, 1 Wend. (N. Y.) 52 (1828); *Mason v. Finch*, 1 Scam. (Ill.) 495 (1838); *Taylor v. White*, 1 T. B. Mon. (Ky.) 37; *Hershey v. Clark*, 27 Ark. 528; *Bowers v. Cherokee*, 45

the court has no power to hear or determine it. But nevertheless it frequently happens in the course of the trial that questions arise in which the title to the premises is involved, and when the case can not be decided without determining such questions, it becomes the duty of the court to either dismiss the case altogether or certify it to some court of competent jurisdiction to try the questions, where statutory provisions require it.¹

Plaintiff claimed the premises under a levy. The deed to defendant from a third person covenanted against incumbrances, "except a certain levy," describing the one under which plaintiff claimed. Held, that inquiry as to whether defendant was estopped by the recital of the deed to make the defense of a paramount title involved, of itself, the trial of a question of title, and therefore could not be considered in summary proceedings. *Hill v. Olin*, 82 Mich. 643; 46 N. W. Rep. 1038 (1890).

§ 30. **Defenses.**—The most usual defense in these actions is the general denial or plea of not guilty; it puts upon the plaintiff the burden of establishing, by a preponderance of the evidence, every material allegation of his complaint. The rules of evidence have, in modern times, been much relaxed, and now courts usually allow matters of justification, excuse or avoidance to be given under the general denial.²

As a general rule the defendant may avail himself of any matter which negatives, explains, or avoids the plaintiff's cause of action.³ As, for example, he may show that the entry was made in a peaceful manner and under a claim to possession in good faith;⁴ that he holds under a contract for title⁵

Calif. 495. The law seems to be otherwise in England. 2 Blackstone's Com., 48, 180, 183; Cruise's Digest, 446; Bigelow's Digest, 447, 453; 1 Chitty's Pleading, 170.

¹ *McNamara v. Culver*, 22 Kan. 661; *Jordan v. Walker*, 56 Iowa, 686; *Tibbitts v. O'Connell*, 66 Ind. 171.

² *Glyn v. Moore*, 25 Calif. 348; *McKenney v. Hopkins*, 20 Iowa, 495; *Raymond v. Bell*, 18 Conn. 81.

³ *Clymer v. Powell*, 56 Miss. 672.

⁴ *Brown v. Beatty*, 76 Ala. 250; *Russell v. Chambers*, 43 Ga. 478; *Dawson v. Dawson*, 17 Neb. 671; *Powell v. Lane*, 45 Calif. 677; *Bird v. Fannon*, 3 Head (Tenn.), 12.

⁵ *Dawson v. Dawson*, 17 Neb. 671; *Klopper v. Hiller*, 1 Colo. 410; *Brown v. Beatty*, 76 Ala. 250. In an action of forcible entry and detainer, a contention by defendant that he is entitled to the possession of the land in controversy, because of a contract by plaintiff to sell it, defendant conceding the title to be in plaintiff, is not prohibited by Code Iowa, § 3620, providing that the question of title shall not be investigated in the action of forcible entry and detainer. *Hall v. Jackson*, 77 Iowa, 201; 41 N. W. Rep. 620 (1889).

or was put in possession under legal process,¹ or any other matters which show that the plaintiff had no sufficient cause of action at the time of the commencement of the suit.² When the defendant is a tenant and defends as such against his landlord, he is usually estopped from denying he plaintiff's possession;³ but he may make an attornment to another person who claims title, and defend on that ground,⁴ or

¹ *Janson v. Brooks*, 29 Calif. 214.

² Where, in an action under Rev. St. Ind., § 5237, providing for the recovery of the possession of land lawfully obtained but unlawfully and forcibly withheld, the evidence shows that plaintiffs voluntarily gave defendant possession of the building, and that when possession was demanded he refused to surrender the premises, and peaceably retained possession, a verdict for defendant may be directed, as the essential element of force in retaining the possession is wholly wanting. *Gipe v. Cummins*, 116 Ind. 511; 19 N. E. Rep. 466 (1889).

In an action of forcible entry and detainer, where defendant pleaded that he had erected a bake oven and building on the lot, at a cost of \$500, under an agreement with the lot owner that he would pay him their actual cost at any time he desired to give up possession, and that in pursuance of said contract he offered to take \$400 for said improvements, which the lot owner refused to pay, *held*, upon the facts stated, not to constitute a defense. *Connolly v. Giddings*, 24 Neb. 131; 37 N. W. Rep. 939 (1888).

In forcible entry, it appearing that plaintiff had purchased a building on leased premises from the tenant without the knowledge of the owner, placing his buggy in the same, and allowing goods of the tenant to remain, and that, after the expiration of the lease, the owner of the premises, in plaintiff's absence, entered on

the same, opened the doors of the building, threw out the goods therein, and threw down a fence erected after the expiration of the lease, a finding "that plaintiff was never in the peaceable possession of the premises," and "that defendant did not, with force or violence or with strong hand, enter upon or break into said building or premises," is justified by the evidence. *Tivnen v. Monahan*, 76 Calif. 131; 18 Pac. Rep. 144 (1888).

Plaintiff had no paper title to the land, which was uninclosed, and had possession of a portion only, which he farmed during the preceding year, leaving some furniture in a house on it, and hay and implements in the barn. During harvest time he lived on the land, but afterward returned to his former residence. Defendant, claiming to pre-empt the land, built and occupied a small house, but took no possession of the improved portion. *Held*, that a verdict for defendant was proper. *McCormick v. Sheridan*, 77 Cal. 253; 19 Pac. Rep. 419 (1888).

³ *McLean v. Spatt*, 20 Fla. 515.

⁴ *Bowser v. Bowser*, 8 Humph. (Tenn.) 23. Where a tenant, under a lease containing a privilege of renewal, holds over his term without any formal renewal, or any notice to the landlord that he intends to renew, equity will not enjoin the landlord from ejecting him, or require him to renew the lease. If, under the terms of the lease and the facts of the case, the tenant is entitled to a renewal,

he may show that the term of his tenancy has not expired,¹ or that from any cause it has not been legally determined.

One who is put in possession upon a parol agreement for the purchase of land, can not be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise; and the action of unlawful detainer stands on the same footing in this respect with the action of ejectment. *Pettit v. Cowherd*, 83 Va. 20; 1 S. E. Rep. 392 (1887).

A notice to remove from and deliver up possession of a building on certain premises is not a sufficient demand under Code Civil Proc. Cal., § 1160, subd. 2, providing that every person is guilty of a forcible detainer "who in the night time, or during the absence of the occupant of any lands, unlawfully enters on real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant;" and until such demand no right of action accrues. *Tivnen v. Monahan*, 76 Cal. 131; 18 Pac. Rep. 144 (1888).

§ 31. The Defendant is Estopped to Deny the Plaintiff's Title.—In this proceeding the rule of law which estops the tenant from denying his landlord's title, or perhaps, more properly speaking, the title under which he entered, applies with all its force;² for having acquired possession under the plaintiff's title, he is not permitted to show that such title was in himself or outstanding in a third party;³ the defendant must

his defense to an action at law for the possession is adequate and complete. *Appeal of Pittsburgh & A. Drove Yard Co.*, 123 Pa. St. 250; 23 W. N. C. 89; 16 Atl. Rep. 625 (1889).

¹ *Ogg v. Sheahan*, 17 Neb. 323; *Rainey v. Cappel*, 22 Ala. 288. The fact that the plaintiff's lease, under which he was in possession at the time of the defendant's entry, expired before the trial of the suit, is not a defense to the action. *Townsend v. Van Aspen*, 88 Ala. 572.

² *Fortier v. Ballance*, 5 Gil. (Ill.) 41 (1848). In unlawful detainer against a hold-over tenant, the landlord's title can not be denied even though the tenant was induced by fraud or mistake to accept the lease, since by Code Ala., § 3339, no inquiry into the merits of the title are permitted in this action. *Nicrosi v. Phillippi* (Ala.), 8 So. Rep. 561; *Am. Dig.* 1891, p. 1834.

The question of title can not be determined in an action of forcible en-

try and detainer. *Stillman v. Palis*, 134 Ill. 532; 25 N. E. Rep. 786.

One claiming to own land in the possession of another procured the execution of a lease by an assertion of title in himself and a threat of eviction. *Held*, that the lease had not been obtained by such craft or fraud as would relieve the lessee from the estoppel arising out of the relation of landlord and tenant, and that he could not in an action by the lessor for rent dispute the plaintiff's title. *School District v. Long* (Pa.), 10 Atl. Rep. 769 (1887).

³ In ejectment, to recover land purchased by plaintiff from the State, defendant, who had entered on the premises under a lease from plaintiff, and after the termination of the lease refused to leave the premises, can not set up title in himself by purchase from one who claimed to be a partner with plaintiff in the acquisition of the land. *Burgess v. Rice*, 74 Cal. 590; 16 Pac. Rep. 496 (1888).

first surrender the possession to the party from whom he received it before he can be permitted to assert a title hostile to the title under which he entered,¹ or under which the persons under whom he holds the possession entered.²

A tenant can not deny his landlord's title, although it appears upon the lease itself that the lessor has no valid title to a part of the term demised, and it is recited in the lease that he demised only such interest as he had in the premises. *Tilyou v. Reynolds*, 108 N. Y. 558; 15 N. E. Rep. 534 (1888).

Under 1 Rev. St. N. Y. p. 744, §3, providing that an attornment by a tenant to a stranger is void unless made with the consent of the landlord, or pursuant to a judgment at law or decree in equity, or to a mortgagee after forfeiture, an attornment by a tenant to one claiming under a tax deed is void as against the rights of his landlord. *O'Donnell v. McIntyre*, 118 N. Y. 156; 23 N. E. Rep. 455 (1890).

A tenant can not, by surrendering possession to an adverse party, deprive his landlord of possession; following *Estabrook v. Hateroth*, 34 N. W. Rep. 634. *Gallagher v. Connell*, 23 Neb. 391; 36 N. W. Rep. 566 (1888).

Under Code Civil Proc. Mont., §37,

providing that when the relation of landlord and tenant has existed the possession of the tenant shall be deemed that of the landlord until five years after the termination of the tenancy, in the absence of fraud and mistake, a lessee, though in possession of the premises at the time of the execution of the lease, can not controvert his lessor's title. *Parrot v. Hungelburger*, 9 Mont. 526; 24 Pac. Rep. 14 (1890).

¹ *Brown v. Keller*, 32 Ill. 151 (1863); *Woodward v. Brown*, 13 Pet. (U. S.) 1 (1839); *Rowan v. Lytle*, 11 Wend. (N. Y.) 616 (1833); *Lowe v. Emerson*, 48 Ill. 160 (1868).

² In an action of forcible detainer by the landlord against the tenant, the latter is not permitted to show that the title of the former has expired or that some third person has a right to the possession. The tenant must first surrender the possession to him from whom he received it, before he shall be permitted to say that his landlord has no longer a right to retain it. *Fortier v. Ballance*, 5 Gil. (Ill.) 41 (1848).

CHAPTER XXVII.

TRESPASS TO TRY TITLE AND OTHER REMEDIES.

- § 1. Trespass to Try Title.
2. The Action in Texas.
3. The Action Distinguished from the Common Law Action of Ejectment.
4. Plaintiff's Proofs—Judgment.
5. Nature of the Action.
6. The Change a Matter of Form Rather than Substance.
7. Parties—Who May Bring the Suit—General Rules Apply.
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12. Real Actions—Reasons for the Name.
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15. The Writ of Right Defined.
16. Ejectment in Massachusetts.
17. A Writ of Entry Defined.
18. Where the Writ Lies.

§ 1. **Trespass to Try Title.**—The name of an action substituted for the action of ejectment in some of the American States. It is in form an action of trespass *quare clausum fregit*, with the additional element of a notice to the effect that the action is brought to try the title to the lands in controversy as well as for the recovery of damages.¹ This notice was sometimes indorsed upon the writ and sometimes upon the petition. This form of the action was substituted for the common law action of ejectment in South Carolina in the latter part of the eighteenth century,² but it has since been abolished in that State.³

§ 2. **The Action in Texas.**—The action of trespass to try title is the exclusive form of action for the trial of suits involv-

¹ Kennedy v. Campbell, 2 Tr. Con. ² General Statutes, Ch. 147, p. 801; R. (S. C.) 760. R. S. S. C. 1873, 586.

³ 5 Statutes at Large S. C. 170.

ing questions of controverted titles in Texas. The notice required to be given is indorsed upon the petition and the questions of title and mesne profits or damages are tried in the same action.¹

§ 3. The Action Distinguished from the Old Common Law Action.—Under the common law action of ejectment, the plaintiff did not recover the term, but simply damages for the trespass, the measure of which was the mesne profits for use and occupation. Afterward, as we have seen, it was molded into the form of a real action by which the plaintiff could recover the term and have his writ of possession with but nominal damages. Thus the original object of the action was reversed. Its form was changed from an action of trespass, with mesne profits as damages, into an action for the term itself, with nominal damages only, leaving the party to his separate action for mesne profits. By subsequent changes originating with Lord Chief Justice Rolle, the parties plaintiff and defendant were made fictitious persons; proofs of lease, entry and ouster were dispensed with, the issues to be tried were narrowed to the question of the right of possession and of title, and the action became, in effect, one to try title.² By the statute of Texas the common law action of ejectment is materially changed and the action of trespass to try title takes its place.³

§ 4. Plaintiff's Proofs—Judgment.—The plaintiff in this form of action is required to prove a trespass upon the premises in controversy committed by the defendant.⁴ If the plaintiff recovers, the judgment is in form for the recovery of damages, but he is entitled to a writ of *habere facias possessionem*.

§ 5. The Nature of the Action.—Trespass to try title is designed as a simple and direct mode of trying titles to land and quieting titles and all fictions of the common law action are abolished.⁵ But the principles of law applicable to actions

¹ Dangerfield v. Paschal, 20 Tex. 552; Spence v. McGowan, 53 Tex. 30; 4784.

R. S. Texas 1879, Ch. 1, Tit. 96, 703, Art. 4784; see page 60 of this work. ⁴ Massey v. Trantham, 2 Bay (S. C.), 421; Underwood v. Simms, 2 Bailey

² Spence v. McGowan, 53 Tex. 34 (S. C.), 81.

(1880); Stroud v. Springfield, 28 Tex. 649; Hough v. Hammond, 36 Tex. 657; Titus v. Johnson, 50 Tex. 224. ⁵ Stroud v. Springfield, 28 Tex. 649 (1880); Titus v. Johnson, 50 Tex. 224; Estherling v. Blythe, 7 Tex. 210.

of ejectment are the rules of action and construction still, notwithstanding the change in the name and form of the proceeding.¹ Under this form of action every character of conflicting titles and disputed claims to real property may be tried.²

§ 6. **The Change a Matter of Form Rather Than of Substance.**—In providing a simple and direct method of trying questions involving the titles to real property in the State of Texas the legislature have merely changed the manner of proceeding; the rules of law appertaining to the action of ejectment and to all questions arising therein apply with equal force to the action of trespass to try title.³

§ 7. **Parties Who May Bring the Action, etc.—General Rules Apply.**—The general rules of law applicable to the parties in general to the action of ejectment, who may maintain the action and the necessary title, pleading, evidence, defenses, damages, and mesne profits, instructions to the jury where issues are tried by jury, verdicts, judgments and writs of possession as discussed in the foregoing chapters, apply generally to all actions for the recovery of the possession of real estate as it exists in the American States, whether under the name of ejectment, writ of entry or trespass to try title.⁴

Illustrations.

(1) *Parties who may maintain, etc.*: In trespass to try title to land by one claiming title to school lands under conveyances from a county as against one who claimed as a prior actual settler, with tender of payment, the county is a necessary party, so that defendant may obtain a title unincumbered from other purchasers, and the plaintiff an abatement in the price paid by him. *Clay County Land & Cattle Co. v. Earle*, 71 Tex. 468; 12 S. W. Rep. 66.

The plaintiff must rely for recovery upon the title he had at the institution of the suit, and a title subsequently acquired can not avail him. *Collins v. Ballow*, 72 Tex. 330; 10 S. W. Rep. 248 (1887).

When the legal title is held by defendant for a third person, such third person is properly admitted as a party defendant to protect his interests. *McPherson v. Johnson*, 69 Tex. 484; 6 S. W. Rep. 798 (1888).

Defendants may sever, though they have jointly pleaded not guilty, on

¹ *Hough v. Hammond*, 36 Tex. 657. 11 S. W. Rep. 330 (1889); *Lerma v.*

² *Titus v. Johnson*, 50 Tex. 224. *Stevenson*, 40 Fed. Rep. 356 (1889);

³ *Hough v. Hammond*, 36 Tex. 657. *Brown v. Roberts*, 75 Tex. 103; 12 S. W. Rep. 807 (1890); *Collins v.*

⁴ *Hough v. Hammond*, 36 Tex. 657; *Wright v. Dunn*, 73 Tex. 293; 248 (1889).

showing that each holds under a separate claim of title, neither having any interest in that part of the land claimed by the other. *Clay County L. & C. Co. v. Wood*, 71 Tex. 460; 9 S. W. Rep. 340.

A defendant having, after suit brought, sold the land, the purchaser, having become an actual settler, should be made a co-defendant. *Id.*

Where the grantee of an interest in a land certificate allows his grantor to locate the certificate in his own name, and makes no claim to the land, though he lives for eight years after his grantor has obtained patent, his heirs are prevented by his *laches* from asserting title to the land. *Howard v. Stubblefield* (Tex.), 14 S. W. Rep. 104 (1891).

Where a locator of "confederate scrip," under Gen. Laws Tex. 1881, page 122, selected lands for himself in one county and for the school fund in another, the locator and the school fund are not tenants in common of the lands selected, and the locator could not maintain trespass to try title, under Rev. St. Tex. 1879, Art. 4795, providing that all certificates which have been located and surveyed shall be deemed sufficient title to authorize the maintenance of the action. *Von Rosenberg v. Cuellar* (Tex.), 16 S. W. Rep. 58.

(2) *Action for several tracts*: Several tracts of land may be sued for in one action of trespass to try title, where plaintiff's interest in all of them grows out of the same transaction. *Murrell v. Wright* (Tex.), 15 S. W. Rep. 156 (1891).

(3) *Action by heirs*: In trespass to try title by the sole heir of an intestate, the administrator is a proper party plaintiff. *Cassidy v. Kluge* (Tex.), 12 S. W. Rep. 12 (1889).

It appeared that the land was purchased at sheriff's sale by defendant's vendor to satisfy a personal judgment against one on whom no personal service was had, he being at the commencement of the suit, and till his death, a non-resident; that plaintiffs were his heirs, but before their suit administration on the estate had begun and was still pending, and debts were still owing by the estate. The administrator was not a party to the suit. *Held*, that the heirs could not recover while the administration was pending, or where there was no administration, without showing that there were no debts owing by the estate. *Northcraft v. Oliver*, 76 Tex. 162; 11 S. W. Rep. 1121 (1889).

One of the heirs of a deceased owner having conveyed 4,000 acres of land by a deed purporting to grant the whole estate, the purchaser inclosed it, and 30,000 acres of other land, with a post and wire fence. The inclosure contained some land not owned or leased by the purchaser, and a few other people lived in the inclosure, and owned cattle that ranged therein; but the purchaser controlled the fences and gates, and excluded all cattle except such as he permitted to remain. His deed had been duly recorded, and he paid all taxes. This possession continued for over five years. *Held*, in trespass to try title brought by the other heir, that there was sufficient evidence of adverse possession to justify a charge on the statute of limitations. *Church v. Waggoner* (Tex.), 14 S. W. Rep. 581 (1890).

§ 8. **Real Actions.**—Real actions were remedies provided by the ancient law for him who had right or title to lands or tenements, the possession of which was unjustly withheld or wrested from him. By these actions the rightful owner might

recover his possession according to the nature and circumstances of the injury he had sustained. The several real actions which the law has provided derive their names either from the principal point stated in the writ or the nature of the wrong to be redressed.¹

§ 9. Real Actions Classified.—Real actions were divided into (1) actions possessory and (2) actions droitual. Actions possessory are again divided into possessory actions upon the demandant's own seizin, and possessory ancestral, upon the seizin of some ancestor. A droitual action is one in which the demandant could no longer recover by writ of entry; or where for some other reason he did not claim upon the possessory title, but the right, in which case his remedy was by writ of right.²

§ 10. Nature of the Different Real Actions.—The several remedies created by these real actions rise above one another according to the nature of the wrong which has been inflicted or the right to be restored. For illustration: A is disseized by B; while the possession continues in B it is a mere naked possession, unsupported by any right. A may, therefore, by entry on the lands, without any action, restore his possession and put an end to the possession of B. But if B died, the possession descended by act of law upon his heirs, in which case, as the heirs came in by lawful title, they acquired in the eye of the law an apparent right of possession. This title was so far good against the person disseized (at least if the disseizor had had possession for five years before his death without entry or claim by the disseizee); that the disseizee lost his right to recover his possession by entry and could only recover it by an action at law. For this purpose a possessory action was resorted to and the writs by which they were instituted were called writs of entry. But if A had permitted the possession to be withheld from him beyond the period limited by the law, or if judgment is recovered against him in a possessory action, either upon a default or a trial of the merits, B's title is strengthened in the eye of the law and A can no longer recover by a possessory action. He must resort to his writ of right. It is his last resort, so that if he failed to commence his writ of right within the time limited by law, he was with-

¹ Stearns on Real Actions, 83.

² Stearns on Real Actions, 83.

out remedy and consequently the title acquired against him by wrong becomes complete and indefeasible.¹

§ 11. **Election of Remedies.**—Under these ancient remedies, the injured party had in many cases an election of remedies. In practice he usually chose the one of the lowest nature, for although judgment against him was a bar to another action of the same or an inferior grade, it was no bar to one of a higher nature.²

§ 12. **Real Actions—Reason for the Name.**—These actions were so called to distinguish them from personal actions, which were grounded upon contracts, torts, etc., of men, one among another, for which damages or something personal was to be recovered, and these followed the person. Real actions being for the recovery of the freehold or inheritance of lands or hereditaments, were either real or mixed. Real when brought for the recovery of the land only, without damages, and mixed when both lands and damages were sought to be recovered.³

§ 13. **Other Ancient Writs and Remedies.**—Of the other real actions and writs for the recovery of hereditaments there was the writ of right patent, etc., right close, the purest and highest writ of right, the writ of right of dower, the writ of right *de rationabile parte*, the writ of right *sur disclaimer*, the writ of escheat, writs of formedons, *quod ei deforceat*, and some others not necessary to mention here. There were also real writs for the performing and doing other things concerning lands and hereditaments, as writs of entry *in the per, cui, post*, as writs of entry in the nature of an assize, writs of intrusion, *cui in vita, cui ante divortium, sur cui in vita*, and some others.⁴

§ 14. **The Remedy by a Writ of Right.**—In many statutes defining in what cases the action of ejectment may be brought we find mention made of the writ of right. As an illustration we quote the statute of Illinois.

“It (the action of ejectment) may also be brought in the same cases in which a writ of right may now be brought by law to recover lands, tenements or hereditaments, and by any person claiming an estate therein in fee for life or for years, either as heir, devisee or purchaser.” R. S. Ill. 1889, 596, § 2.

¹ Coke on Litt., 239 a, n. 1; Stearns on Real Actions, 83, 84.

² Booth on Real Actions, 1; Stearns on Real Actions, 84.

³ Booth on Real Actions, II.

⁴ Booth on Real Actions, III.

The writ of right as a remedy for the recovery of the possession of real property has become obsolete, in most, if not in all, of the American States.

§ 15. **The Writ of Right Defined.**—The remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee simple, founding his title on the right of property, or mere right, arising either from his own seizin, or the seizin of his ancestor or predecessor.¹

At common law, a writ of right lies only against the tenant of the freehold demanded.²

This writ brings into controversy only the rights of the parties in the suit, and a defense that a third person has a better title will not avail.³

§ 16. **Ejectment in Massachusetts—Writ of Entry.**—In Massachusetts all estates of freehold, whether in fee simple, fee tail or for life, may be recovered by a writ of entry upon disseizin unless a different action is prescribed by law.⁴

§ 17. **A Writ of Entry Defined.**—A writ requiring the sheriff to command the tenant of land that he render to the demandant the possession of the premises in question, or to appear in court on a certain day named in the writ to show cause why he has not done so. It is called a "*writ of entry sur disseizin*."⁵ In Massachusetts this writ takes the place of the action of ejectment for the recovery of freehold estates.⁶

§ 18. **Where the Writ Lies.**—A writ of entry can only be maintained against the tenant of the freehold. It is an action to recover a freehold, and the tenant must, therefore, have the freehold, either by right or by wrong; for a freehold can not be lawfully demanded but against him who has a freehold.⁷ Non-tenure is a good bar to the action and is expressly recognized as such by the statutes of Massachusetts regulating real

¹ F. N. B. 1, B.; 3 Blackstone's Com. 391.

² Green v. Litter, 8 Cranch (U. S.), 239.

³ Brown v. Wood, 17 Mass. 74; Green v. Watkins, 7 Wheat. (U. S.) 27; Inglis v. Trustees, 3 Pet. (U. S.) 133; Ten Eyck v. Waterbury, 7 Cow. (N. Y.) 52.

⁴ R. S. Mass. 1882, p. 1017.

⁵ Coke on Littleton, 238 b; 2 Bouvier's Law Dic. 664.

⁶ Gen. Stats. Mass., 1882, Sec. 1, page 1018.

⁷ Kerley v. Kerley, 95 Mass. 286 (1866); Stearns on Real Actions, 89; Jackson on Real Actions, 22, 90; Higbee v. Rice, 5 Mass. 344; Bacon v. Callendar, 6 Mass. 303.

actions.¹ When the tenant pleads non-tenure in abatement or gives it in evidence, as he may do under the general issue of *nul disseizin*, the demandant must show a wrongful possession or ouster by the tenant or the defense will prevail.²

¹ Gen. Stats. Mass., Chap. 134, § 12. ² Kerley v. Kerley, 95 Mass. 286 (1866).

CHAPTER XXVIII.

SURVIVAL OF THE ACTION—ABATEMENT AND REVIVOR.

- § 1. Survival of the Action at Common Law.
2. Revivor by a Portion of the Heirs.
3. Death of a Fictitious Party.
4. The Actions Survive Under Statutes.
5. Statutory Provisions—Abatement and Revivor.

§ 1. **Survival of the Action of Ejectment—At Common Law.**—(1) *Death of plaintiff.* At common law the action did not abate upon death of the lessor of the plaintiff occurring after commencement of the suit, although it seems to have been received as an excuse for not proceeding with the suit according to the practice of the court.¹

But if it appeared on the trial that the lessor of the plaintiff was dead when the suit was commenced, it was a ground of non-suit. It was a general rule that the demise of a lessor who died before the commencement of the action would be struck out of the declaration, on motion of the defendant before trial, on the ground that it was an irregularity in the plaintiff to make a dead man a lessor. Although the demise was a fiction, the fiction was required to be such as might by a possibility have been true, which could not have been the case if the lessor of the plaintiff was dead at the time of the commencement of the action.²

At common law, where the lessor of the plaintiff in ejectment was only a tenant for life, his death did not abate the action, nor could it be pleaded *puis darrien continuance*, because his right was supposed to be in the plaintiff, his lessee, who might proceed for the damages occasioned by the sup-

¹ Frier v. Jackson, 8 Johns. (N. Y.) 531; *contra* Ha-495; Austin v. Jackson, 1 Wend. wood v. Gardiner, 3 Har. & McH. (N. Y.) 27; Doe v. Butler, 3 Ib. 149, (Md.) 98.

153; Robertson v. Morgan, 2 Bibb ² Lee v. Grunlee, 6 Mun. (Va.) 303; (Ky.), 148; Kinney v. Beverly, 1 Doe v. Butler, 3 Wend. (N. Y.) 149.

posed ouster, although he could not obtain possession of the land.¹ In such cases the title of the plaintiff terminated with the death of the lessor, and the plaintiff could have no title to turn the defendant out of possession; but he might, nevertheless, have a title to the mesne profits and the costs of the suit, and could have judgment to enable him to recover them.²

Where the lessor of the plaintiff was entitled to a life estate in the premises, but the defendant had the reversionary interest therein, and pending the suit the life estate terminated by the death of the lessor, the court said: "The plaintiff, then, has no title to turn the defendant out of the possession; but he has a title to the mesne profits and the costs of this suit, and must therefore have judgment to enable him to recover them." There must be a judgment for the plaintiff, with a perpetual stay of the writ of possession. *Jackson v. Davenport*, 18 Johns. (N. Y.) 295, 302.

(2) *Death of the defendant.* At common law the action of ejectment abated upon the death of the defendant and could not be revived against his heirs or personal representatives. The common law in this respect appears to be based upon the reason that it is not to be presumed the premises in controversy pass at once into the actual possession of the heirs upon the death of the defendant. The plaintiff may enter into their peaceable possession without suit and the heirs may not have been guilty of wrongfully withholding the possession.³

§ 2. **Revivor by a Portion of the Heirs.**—In all other actions the rights of plaintiffs are joint and the right remains joint in the survivors or representatives; and hence all having an interest in the subject-matter of the suit must join in reviving it. But by the death of the plaintiff in ejectment the unity of the title is severed and it descends in aliquot parts to his several heirs, and they each become invested with a separate right of recovery. Cases may not infrequently occur in which, if the law did not permit a revivor of the action by a portion of the heirs, there would be a denial of justice. Suppose the statute of limitations is upon the point of forming a bar at the time suit is brought, and afterward the plaintiff dies; at the time of his death the limited period has fully expired and a part or any of his heirs refused to join in the revivor; the result is an abatement of the suit and the other heirs can not

¹*Thrustout v. Gray*, Stran. 1056; *son v. Davenport*, 18 Johns. (N. Y.) Adams on Ejectment, 382. 295.

²*Thrustout v. Gray*, Stran. 1056; ³*Farrall v. Shea*, 66 Wis. 561; 29 N. *Thrustout v. Bidwell*, 2 Wils. 7; *Jack- W. Rep.* 634 (1886).

recover on bringing a new suit. In such cases all can see the necessity of permitting a part of the heirs to revive the action and proceed to judgment, even though a statute may not in express terms allow a revivor by a part of the heirs.¹

§ 3. **Death of a Fictitious Party.**—Under the old practice it was the settled doctrine for a long time that the death of a lessor did not abate a suit in ejectment; the action was considered a legal fiction devised to subserve the purpose of justice and was modeled as those purposes required. So far was this doctrine carried in the advancement of justice, that even when the lessor was a tenant for life, his death was not permitted to abate the suit, which might still be prosecuted for the damages and costs.²

§ 4. **The Action Survives Under Statutes.**—The statutes of many States provide that the action of ejectment shall not be abated by the death of any plaintiff or defendant. The same proceedings must be had as in other actions to substitute the name of those who may succeed to the title of the party so dying, and the issue is then tried as between the original parties. In those States where the declaration or complaint may contain a count in which all the plaintiffs claim to recover jointly, and also counts in which each plaintiff claims the right to recover separately the whole or any undivided interest in the premises, part of the plaintiffs may recover and a part may fail in the action. And where, upon the death of the plaintiff, a part of the heirs revive and file an amended count, and recover, the same result is produced as when a part of the plaintiffs recover and a part fail.³

§ 5. **Statutory Provisions—Abatement and Revivor.**

(1) COLORADO.

SECTION 270. *Not abate by death—Revival.* The action for the recovery of real property shall not abate by the death of either or all of the parties thereto, but may be revived in the

¹ Funk v. Stubblefield, 62 Ill. 405 (1872).

³ Funk v. Stubblefield, 62 Ill. 405 (1872).

² Frier v. Jackson, 8 Johns. (N. Y.) 495; 1 Bac. Abr., 13; Vin. Abr., Eject., tit. Pl., 4; 2 Strahan, 1056.

name of the heirs, representatives or successors in interest, in the manner other civil actions are revived by this act.

Civil Code Colo. 1887, p. 173.

(2) ILLINOIS.

SECTION 51. If the plaintiff in ejectment shall have died after issue joined or judgment therein, his personal representatives may enter a suggestion of such death, of the granting letters testamentary, or of administration to them, and may suggest their claim to the mesne profits of the premises recovered, in the same manner, and with the like effect, as the deceased; and the same proceedings in all respects shall be had thereon.

R. S. Ill., Ch. 45, § 51.

(3) MASSACHUSETTS.

SECTION 41. *Provisions for case of death of either party to writ of entry after judgment and before final settlement.* The writ of seizin issued in such case shall be in the name of the original demandant against the original tenant, although either or both of them are dead, and when executed it shall inure to the benefit of the demandant or of the person who is entitled to the premises under him, in like manner as if it had been executed on the day when the judgment was rendered.

G. S. Mass., 134, § 42.

(4) MISSISSIPPI.

SECTION 2493. *Action not abated by death.* The death of a plaintiff or defendant in ejectment shall not cause the action to abate, but it may be continued as hereafter provided.

Sec. 2494. *Death of one of several plaintiffs.* In case the right of a deceased plaintiff shall survive to another plaintiff, a suggestion may be made of the death, and the action may proceed at the suit of the surviving plaintiff; and if the suggestion be made before the trial, the plaintiff shall have a verdict and judgment, upon its appearing that he was entitled to bring the action either separately or jointly, with the deceased plaintiff; and in case of the death before trial of one of several plaintiffs, whose right does not survive to any of the other plaintiffs, if the legal representative of the deceased plaintiff shall not become a party to the action, a suggestion may be made of the death, and the action may proceed at the

suit of the surviving plaintiff for such share of the property as he is entitled to, and costs.

Sec. 2495. *Death of a plaintiff after verdict or judgment.* In case of a verdict for two or more plaintiffs, if one of them dies before final process is executed by delivery of possession, thereupon the other plaintiff may, whether the legal right to the property shall survive or not, suggest the death in the manner aforesaid, and proceed to judgment and execution for the recovery of the possession of the whole of the premises in question, to which the right of possession may be found by the verdict, and the costs; or in case such death shall occur after the judgment, the surviving plaintiff may, without such suggestion, take out execution and recover possession of the whole of the premises as aforesaid; but nothing herein contained shall affect the right of the legal representative of the deceased plaintiff, or the liability of the surviving plaintiff to such representative; and the entry and possession of such surviving plaintiff, under such execution, shall be considered an entry and possession on behalf of such representative in respect of the share of the premises in question, to which he shall be entitled as such representative, and the court may direct possession to be delivered accordingly.

Sec. 2496. *Death of plaintiff whose right does not survive.* In case of the death, before trial, of a sole plaintiff, or of any of several plaintiffs, whose right does not survive to any other plaintiff, the legal representative of such deceased plaintiff, may, by leave of court, enter a suggestion of such death, and that he is such legal representative, and the action shall thereupon proceed, and the truth of the suggestion shall be tried on the trial of the action, together with the title of such deceased plaintiff, and such judgment shall follow on the verdict in favor of or against the person making such suggestion, as is hereinbefore provided, with reference to a judgment for or against such deceased plaintiff.

Sec. 2497. *Death of sole plaintiff after verdict, etc.* In case a sole plaintiff dies, after a verdict in his favor, and before final process is executed, judgment, if not entered, shall be entered in his favor, and shall have the same effect as if entered in his lifetime; and the court, on suggestion of such death, and application of the legal representative of the

deceased plaintiff, may order that a writ issue for the delivery to such representative of the possession of the premises recovered, and the same shall be delivered accordingly, subject, however, to such terms as the court may impose; and the personal representatives of such deceased plaintiff shall have the like remedies for the collection of the costs recovered by such judgment, as they would have upon any other judgment for money in favor of the deceased.

Sec. 2498. *Death, before judgment, of one of several defendants.* In case of the death, before judgment, of one of several defendants, who defend jointly, a suggestion may be made of the death, and the action may proceed against the surviving defendant to judgment and execution; but if such death happen before trial, the court, in its discretion, may order that the legal representative of such deceased defendant be summoned to appear and defend the action, within a time to be limited by the court; and in case such representative appear, he shall plead the same plea, and the same proceedings shall be taken against him as if he had been originally admitted to defend the action; and if no such order be made, or if one be made and such representative, having been duly summoned, do not appear and plead within the time so limited, then the plaintiff suggesting the death, in manner as aforesaid, may proceed against the surviving defendants to judgment and execution.

Sec. 2499. *Death of all defendants before trial.* In case of the death of a sole defendant, or of all the defendants, before trial, a suggestion may be made of the death, and if the legal representatives of such deceased defendant or defendants shall not voluntarily appear and become parties to the action, the court shall order such representatives to be summoned to appear and defend the action, within a time to be limited by the court; and in case such representatives appear they shall plead the same plea, and the same proceedings may be taken against them as if they had been originally admitted to defend the action; and if no plea be filed within the time limited, the plaintiff shall be entitled to judgment for want of a plea, and may have a writ of possession for the recovery of possession of the premises in question, in the same manner as if the original defendant or defendants were still living.

Sec. 2500. *Death of all defendants after verdict.* In case of the death of a sole defendant, or of all the defendants, after verdict against him or them, the plaintiff shall, nevertheless, be entitled to judgment, as if no such death had taken place, and to proceed by execution for the recovery of possession, without suggestion or revivor, and to proceed for the recovery of the costs, in like manner as upon any other judgment for money, against such defendant or defendants.

Sec. 2501. *Death of one, who defends separately.* In case of the death of one of several defendants, who defends separately, for a portion of the premises in question, for which no other defendant defends, before trial, or after a verdict against him, the same proceedings may be taken as to such portions, as in the case of the death of a sole defendant, and the plaintiff may proceed against the surviving defendant in respect of the portion of the premises for which he defends.

Sec. 2502. *Death of one, when another defends for same.* In case of the death, before trial, of one of several defendants, who defends separately, in respect of property for which a surviving defendant also defends, the court may order that the legal representative of such deceased defendant be summoned to appear and defend the action, within a time to be limited by said court, and in case such representative appears, he shall plead the same plea, and the same proceedings may be had against him as if he had been originally admitted to defend such action; and if no such order be made, or if one be made, and such representative, having been duly summoned, does not appear and plead within the time so limited, then the plaintiff suggesting the death in manner aforesaid, may proceed against the surviving defendants to judgment and execution.

Revised Code Miss., 1880, Ch. 68.

(5) NEW JERSEY.

Sec. 28. *Action not abated by death.* The death of a plaintiff or defendant in ejectment shall not cause the action to abate, but it may be continued as hereinafter provided.

Sec. 29. *Proceedings in case of death of plaintiff.* In case the right of the deceased plaintiff shall survive to another

plaintiff, a suggestion may be made of the death, which suggestion shall not be traversable, but be subject to be set aside, if untrue, and the action may proceed at the suit of the surviving plaintiff; and if such suggestion be made before the trial, then the plaintiff shall have a verdict, and recover such judgment as aforesaid, upon its appearing that he was entitled to bring the action, either separately, or jointly with the deceased plaintiff; and in case of the death before the trial of one of several plaintiffs, whose right does not survive to any other of the plaintiffs, if the legal representatives of the deceased plaintiff shall not become a party to the action, in the manner hereinafter provided, a suggestion may be made of the death, which shall not be traversable, but be subject to be set aside if untrue, and the action may proceed at the suit of the surviving plaintiff, for such share of the property as he is entitled to, and costs.

Sec. 30. *Death of one of several plaintiffs after verdict.* In case of a verdict for two or more plaintiffs, if one of such plaintiffs die before execution executed by delivery of possession thereupon, the other plaintiff may, whether the legal right to the property survive or not, suggest the death in the manner aforesaid, and proceed to judgment and execution for recovery of the possession of the whole of the premises in question to which the right of possession may be found by the verdict; but nothing herein contained shall affect the right of the legal representative of the deceased plaintiff, or the liability of the surviving plaintiff to such representative; and the entry and possession of such surviving plaintiff, under such execution, shall be considered as an entry and possession on behalf of such representative, in respect of the share of the premises in question to which he shall be entitled as such representative, and the court may direct possession to be delivered accordingly.

Sec. 31. *Death of sole plaintiff before trial.* In case of the death before trial of a sole plaintiff, or of one of several plaintiffs whose right does not survive to any other plaintiff, the legal representative of such deceased plaintiff may, by leave of court, enter suggestion of such death, and that he is such legal representative, and the action shall thereupon proceed; and the truth of such suggestion shall be tried on the trial of the action, together with the title of the deceased plaintiff.

iff; and such judgment shall follow upon the verdict in favor of or against the person making such suggestion, as is hereinbefore provided with reference to a judgment for or against such deceased plaintiff.

Sec. 32. *Death of sole plaintiff after verdict.* In case a sole plaintiff die after a verdict in his favor, and before execution executed by delivery of possession thereon, judgment shall nevertheless be entered in his favor, and have the same effect as if entered in his lifetime; and the court upon suggestion of his death, and application of the legal representative of the deceased plaintiff, may order that a writ issue for the delivery to such representative of the possession of the premises recovered, and the same shall be delivered accordingly, subject, however, to such terms as the court may impose; and the personal representatives of such deceased plaintiff shall have like remedies for the collection of the costs recovered by such judgment as they would have upon any other judgment for money in favor of said deceased.

Sec. 33. *In case of verdict for defendant and death of plaintiff before judgment.* If, after a verdict in favor of a defendant, a sole plaintiff, or one of several plaintiffs, die before judgment, the defendant shall nevertheless be entitled to judgment as if no such death had happened, and in case of a sole plaintiff, the defendant may proceed for the recovery of his costs in like manner as upon any other judgment for money, against such deceased; and in case of several plaintiffs, the defendant may have execution against the surviving plaintiff for his costs; and if, after such verdict in favor of a defendant, and before judgment, he shall die, judgment shall nevertheless be entered in his favor, and have the same effect as if entered in his lifetime.

Sec. 34. *Proceedings in case of death of one defendant before judgment.* In case of the death before judgment of one of several defendants who defends jointly, a suggestion may be made of the death, which suggestion shall not be traversable, but subject to be set aside if untrue, and the action may proceed against the surviving defendant to judgment and execution; but if such death happen before trial, the court, in its discretion, may order that notice be given to the legal representatives of such deceased defendant to appear and defend the action within a time to be limited by the court, the notice

to be served in such manner as the court may direct; and in case such representative appear and plead he shall plead the same plea, and the same proceedings shall be taken against him as if he had been originally admitted to defend the action; and if no such order be made, or if one be made, and such representative do not appear and plead within the time so limited, and an affidavit be filed of the due service of such notice, then the plaintiff suggesting the death, in manner aforesaid, may proceed against the surviving defendant to judgment and execution.

Sec. 35. *In case of death of sole defendant before trial.* In case of the death of sole defendant before trial, or of all the defendants before trial, a suggestion may be made of the death, which suggestion shall not be traversable, but subject to be set aside if untrue, and plaintiff shall be entitled to a judgment for the recovery of the possession of the premises in question, unless some other person shall appear and defend within the time to be appointed for that purpose by the order of the court, to be made on the application of the plaintiff; and the court, upon such application, may order that the plaintiff shall be at liberty to sign judgment within such time as the court may think fit, unless the legal representatives of the deceased defendant or defendants shall, within such time, appear and plead to the action; and such order may be served in such manner as the court, under the circumstances, may direct; and in case such person shall appear and plead, he shall plead the same plea, and the same proceedings shall be taken against him, as if he had been originally admitted to defend the action; and if no plea be filed within the time limited, then the plaintiff, upon filing an affidavit of the due service of such order, shall be at liberty to sign judgment pursuant thereto.

Sec. 36. *In case of death of sole defendant after verdict.* In case of the death of the sole defendant, or of all the defendants, after verdict against him or them, the plaintiff shall nevertheless be entitled to judgment as if no such death had taken place, and to proceed by execution for the recovery of possession without suggestion or revivor, and to proceed for the recovery of the costs in like manner as upon any judgment for money against such defendant or defendants.

Sec. 37. *In case of death of defendant who defends sex-*

arately. In case of the death of one of several defendants, who defends separately for a portion of the premises in question, for which no other defendant defends, before trial or after a verdict against him, the same proceedings may be taken as to such portion as in case of the death of a sole defendant, or the plaintiff may proceed against the surviving defendant in respect of the portion of the premises in question for which he defends.

Sec. 38. *In case of death of defendant who defends separately in respect to property which surviving defendant also defends for.* In case of the death before trial of one of several defendants who defends separately in respect of property for which a surviving defendant also defends, the court, at any time before the trial, may order notice to the legal representative of such deceased defendant to appear and defend the action within a time to be limited by the court, the notice to be served in such manner as the court may, under the circumstances direct; and in case such representative appear and plead, he shall plead the same plea and the same proceedings may be taken against him as if he had been originally admitted to defend the action; and if no such order be made or if one be made and such representative do not appear and plead within the time so limited, and an affidavit be filed of the due service of such notice, then the plaintiff suggesting the death, in manner aforesaid, may proceed against the surviving defendant to judgment and execution.

R. S. N. J. 1877, 326 *et seq.*

(6) NEW YORK.

SECTION 25. The action of ejectment shall not be abated by the death of any plaintiff; or of one of several defendants, after issue and before verdict or judgment; but the same proceedings may be had as in other actions, to substitute the names of those who may succeed to the title of the plaintiff so dying, in which case the issue shall be tried as between the original parties; and in case of the death of a defendant, the cause shall proceed against the other defendants.

2 R. S. N. Y. 1849, 399.

(7) PENNSYLVANIA.

SECTION 12. *Ejectment not to abate by death.* No writ of ejectment shall abate by reason of the death of any plaintiff

or defendant, but the person or persons next in interest may be substituted in the place of the plaintiff or defendant, who shall have died pending the writ.

1 Brightly's Purdon's Digest, 531.

(8) TENNESSEE.

SECTION 3986. *Death not to abate.* The death of either party does not abate the action, but it may be revived in favor of the heirs or devisees of the plaintiff, and against the heirs and terre-tenants of the defendant.

Milliken & Vertree's Code, 1884, 762.

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